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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation, *Petitioners*

v.

Karla Pierce, Secretary, Kansas Department of Revenue, *Respondent*

On Petition For A Writ Of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the United States Supreme Court case entitled *The Kansas Indians*, 72 U.S. 737 (1866), the controlling case for the interpretation and construction of the *Kansas Enabling Act*, 12 Stat. 126; thereby, vitiating the court of appeal's reliance on the federal circuit court opinion in *United States v. Ward*, 28 F.Cas. 397 (1863)?

2. Can the Tenth Circuit Court of Appeals judicially modify the act of Congress that allowed the State of Kansas to join the Union on the specific terms and conditions that Indian Country would be excluded from the jurisdiction and territory of the State of Kansas; thereby, overturning lower federal court decisions?

3. Did the court of appeals misconstrue the interpretation of the *Kansas Enabling Act* as developed by the Kansas state courts by failing to rely upon the Kansas Supreme Court's ruling in the case of *Parker v. Winsor*, 5 Kan 362?

4. When considered in light of its congressional legislative history, does the language of the *Kansas Enabling Act* place Indian Country beyond the civil jurisdiction and control of the State of Kansas?

5. Did the Tenth Circuit Court of Appeals misconstrue, misinterpret, and misunderstand the Indian Treaty law for the Kansas Tribes?

6. Did the Tenth Circuit Court of Appeals unilaterally modify the treaties of the Iowa, Kickapoo, and Sac & Fox Tribes by its ruling that Kansas has civil jurisdiction over Indian Country?

LIST OF PARTIES

The parties to the lower court proceedings were Petitioners: the Iowa Tribe of Kansas and Nebraska ("Iowa"),Kickapoo Tribe in Kansas a/k/a Kickapoo Tribe of Kansas ("Kickapoo Tribe"), and the Sac and Fox Nation of Missouri ("Sac and Fox"); and the Respondent was Karla Pierce, the Secretary for the Kansas Department of Revenue.

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Karla Pierce, Secretary, Kansas Department of Revenue, *Respondent*

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in this proceeding on May 30, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals to be reviewed is *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 2000 CJ C.A.R. 3222 (10th Cir. (Kan.) May 30, 2000) (NO. 99-3019).

Prior district court case reversed by the Court of Appeals is *Sac and Fox Nation of Missouri v. Pierce*, 45 F.Supp.2d 859 (D. Kan. Mar 15, 1999) (NO. CIV. A. 95-4152-DES) also known as *Sac and Fox Nation of Missouri v. Lafaver*, 31 F.Supp.2d 1298 (D. Kan. Dec 17, 1998) (NO. CIV. A. 95-4152-DES). There are two names and two

decisions, but they are the same case.

STATEMENT OF JURISDICTION

Pursuant to *28 U.S.C. §1254(1),* the jurisdiction of the United States Supreme Court is invoked. On May 30, 2000, the judgment of the United States Tenth Circuit Court of Appeals was entered in *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 2000 CJ C.A.R. 3222 (10th Cir. (Kan.) May 30, 2000) (NO. 99-3019). On June 14, 2000, a combined Petition for Panel Rehearing and Rehearing *En Banc* for Appellees Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, and Kickapoo Tribe of Kansas was timely filed with the appellate court. On July 14, 2000, the Order denying Appellees' petition for rehearing and rehearing *en banc* was filed by the appellate court. This petition was filed within 90 days of July 14, 2000.

STATUTE INVOLVED

28 U.S.C. 1254 (1). Courts of Appeals, certiorari; certified questions:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of ceriorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;....

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, AND UNPUBLISHED CASES

1. "U.S. Constitution", Amendment V.

2. "Indian Removal Act", Act of May 28, 1830, 4 Stat. 411.

3. "An Act to Organize the Territory of Kansas," Act of May 30, 1854, ch. 59, §20, 10 Stat. 284.

4. "An Act for the Admission of Kansas Into the Union," Act of Jan. 29, 1861, ch. 20, §1, 12 Stat. 126.

5. "The Kansas Act", 18 USC 3243.

6. Kan. Stat. Ann. §79-3408 (1999).

7. Treaty with the Kickapoo, Oct. 24, 1832, 7 Stat. 391.

8. Treaty with the Kickapoo, May 18, 1854, 10 Stat. 1078.

9. Treaty with the Iowa, Sept. 17, 1836, art. 2, 7 Stat. 511.

10. Treaty with the Iowa, May 17, 1854, art. 1, 10 Stat. 1069 72.

11. Treaty with the Sacs and Foxes, May 18, 1854, art. 1, 10 Stat. 1074.

12. *Prairie Band of Potawatomi Indians, et al. v. Raymond Jackman, United States District Court for the District of Kansas, Case No.95-3268*, ("*Jackman*").

13. *Kickapoo Tribe v. Shoemaker, United States District Court for the District of Kansas, Case No. 99-4059-SAC, ("Shoemaker").*

Because of their length, the statutes and treaties above are set forth in the separate Appendix II.

STATEMENT OF THE CASE

This is a unique case. It is an action to determine if the Kansas Indian lands, including the Indian reservations are now subject to the civil jurisdiction and control of the State in Kansas.

The Petitioners are 3 of the 4 Indian Nations located within the state of Kansas: the Iowa Tribe of Kansas and Nebraska ("Iowa"), Kickapoo Tribe in Kansas a/k/a Kickapoo Tribe of Kansas ("Kickapoo Tribe"), and the Sac and Fox Nation of Missouri ("Sac and Fox"). The Petitioners will be jointly referred to as the Tribes. Respondent is Karla Pierce, the Secretary for the Kansas Department of Revenue. The Tribes seek review of the judgment of the Court of Appeals reversing the judgment of the District Court of Kansas.

This case originally started as an action to enjoin the state of Kansas from collecting tax on motor fuel distributed to the tribes' retail stations. However, because of the ruling of the Tenth Circuit Court of Appeals on the issue of whether the Indian lands are subject to the control of the state of Kansas, this case is no longer solely focused on the taxation rulings. The Writ of Certiorari is asking for review of the appellate ruling that the Indian lands, including their reservations, are subject to the civil jurisdiction of the state of Kansas. This case is about the sovereignty and jurisdiction of Indian Tribes and their property and land in Kansas.

This unique issue is clearly distinguishable from other Indian tax cases. It is an action to determine if the imposition of the Kansas motor fuel tax on the four Indian reservations is preempted by the *Kansas Enabling Act*, which expressly provides that the reservations are extraterritorial to the State of Kansas. The extra-territoriality of the reservations is affirmed by the legislative history of the *Kansas Enabling Act*, by this Court's decision in the case of *In re Kansas Indians, 72 U.S. 737 (1866)*, and by other cases including U.S. District Court and Kansas Supreme Court decisions.

The Tribes seek review of the Tenth Circuit's reversal of the District Court ruling that Kansas Enabling Act made it "...very clear to the court that the Indian reservations are not to be considered part of the state of Kansas in any way. The plain language of both acts states that "'...all such territory shall be excepted out of the boundaries and constitute no part of the territory [state] of Kansas.'" *Sac and Fox Nation of Missouri v. Lafaver, 31 F.Supp.2d 1298, 1304 (D. Kan. 1998)*. The District Court found that both *Kansas Enabling Act* and the *Kansas Territorial Organic Act* made it "...very clear to the court that the Indian reservations are not to be considered part of the state of Kansas in any way. The plain language of both acts

states that "...all such territory shall be excepted out of the boundaries and constitute no part of the territory [state] of Kansas." 31 F.Supp.2d at 1304.

Based on its findings that the reservations were extraterritorial to the State of Kansas, the District Court invalidated the imposition of the tax on the reservations:

> K.S.A. 79-3408(d)(1) "exempts any fuel transactions where fuel is exported "to any other state or territory or to any foreign country." From this reading, the court can only conclude that the intent of the Kansas Legislature was to exempt any transaction where fuel was to be sold outside the boundaries of the state of Kansas. As the Act for Admission of Kansas Into the Union and the Organic Act both clearly exclude the Indian reservations from the boundaries of the state of Kansas, it is only reasonable that 79-3408(1) provides for an exemption to the transactions involved in this case where fuel is sold to tribal retailers on the recognized reservations." 31 F.Supp.2d at 13

The Tenth Circuit reversed the judgment of the District Court of Kansas on May 30, 2000:

> "...under Act for Admission of Kansas Into the Union, all territory not previously exempted from the boundaries of the state of Kansas by treaty between the United States and an Indian tribe was included within the state, within its jurisdiction and within its territory." *Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566, 577 (10th Cir. 2000).*

The court further concluded:

> "...exemption from taxation provided by K.S.A. 79-3408(d)(1) did not apply to the [Tribes in this case] because Indian reservations within the boundaries of the State are not included as territories outside the boundaries of Kansas." *Id.*

The Tenth Circuit decision is in direct conflict with this Court's decision in *The Kansas Indians, 72 U.S. 737 (1866)*, which held that the Kansas reservations were not within the territorial boundaries and jurisdiction of the state of Kansas. "Kansas accepted her admission into the family of States on the condition that the Indian rights should remain unimpaired...." *72 U.S. at 755.* The Tenth Circuit overturned 134 years of established precedent. The Tenth Circuit cannot change an important question of federal law settled by this Court in 1866 or make a ruling that conflicts with the decision of the United States Supreme Court.

The initial jurisdiction of the U.S. Federal District Court was invoked under 28 U.S.C. 1331 and 28 U.S.C. 1362.

REASONS FOR GRANTING THE WRIT

1. INTRODUCTION

"The pen is mightier than the sword."
Edward George Bulwer-Lytton.

What George Armstrong Custer and the U. S. Army's Seventh Calvary could not accomplish while they were encamped in and about the Kansas Indian Reservations after the Civil War, the Tenth Circuit Court of Appeals has accomplished in the case of *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 2000 (10th Cir. Kan. May 30, 2000) ("*Pierce*") with its written decision. In *Pierce* the Tenth Circuit Court of Appeals destroys the jurisdictional and territorial integrity of the Iowa, Kickapoo, and Sac and Fox Nations by holding:

> "...Under the Act for Admission of Kansas Into the Union, all territory not previously exempted from the boundaries of the State of Kansas by treaty between the United States and an Indian Tribe was included with the State within its jurisdiction and within its territory." (*Pierce, 213 F.3d 566, 577)*

(10th Circuit. 2000))

With these 45 words, the court of appeals did what the army could not – eliminate the language in the Kansas Act of Admission that protected these sovereign Indian Nations from the oppression of and annihilation by the State of Kansas.

The Petitioners plead for a grant of certiorari, so this portion of the holding in *Pierce* can be reversed. Certiorari to the United States Supreme Court should be granted for one or more of the following reasons:

1. The ruling of the Tenth Circuit Court of Appeals is in direct conflict with the only United States Supreme Court decision, *In re Kansas Indians, 72 U.S. 737 (1866)* (*"Kansas Indians"*), construing the *Act for Admission of Kansas Into the Union, 12 Stat 126* (*"Kansas Enabling Act"*);

2. This appellate decision is in direct conflict with other Kansas U. S. federal district court decisions relying upon the *Kansas Indians* construction and interpretation of the *Kansas Enabling Act*;

3. *Pierce* is also in direct conflict with the decision of the Kansas Supreme Court , the highest court for the state of Kansas, in the case of *Parker v. Winsor, 510 Kan. 362 (1870)* (*"Parker"*);

4. The *Pierce* decision is in direct conflict with the actual language of the *Kansas Enabling Act* and its legislative history;

5. The *Pierce* decision is in direct conflict with the Iowa, Kickapoo, and Sac and Fox Nations' Treaties

enticing these Tribes to move to Kansas; and

6. The *Pierce* court misinterprets and misconstrues federal law concerning tribal sovereignty and the exclusive retention of civil jurisdiction by the Iowa, Kickapoo, and Sac and Fox Nations on their Indian Reservations located in the Northeast corner of Kansas.

The portion of the *Pierce* decision that holds that the Indian Reservations are a part of the territory of Kansas is clearly erroneous, and if not reversed will result in the state of Kansas seizing by judicial fiat what could not be taken from these Indian Nation while the socio-economic policy of "*Manifest Destiny*" gripped 19th Century America and justified the expansion of the United States from the Atlantic Ocean to the Pacific Ocean even at the expense of near-annihilation of the American Indian Tribes.

Unless this decision is reviewed, these Indian Nations will be destroyed by the pen just as if it was the 19th Century – not the 21st Century.

1. DIRECT CONFLICT WITH U.S. SUPREME COURT DECISION.

First and foremost, the Tenth Circuit's decision in *Pierce* is in direct conflict with the U.S. Courts decision in the case of *In re Kansas Indians, 72 U.S. 737 (1866)* ("*Kansas Indians*"). The U.S. Supreme Court interpreted the *Kansas Enabling Act, 12 Stat 126,* in the *Kansas Indians* case, yet the court of appeals did not even mention this case. Obviously, the court of appeals wholly overlooked or intentionally ignored the controlling U.S. Supreme Court case on this issue. If it had examined the controlling case, *Kansas Indians*, this Petition for Writ of Certiorari would not be filed, because the result would have been different.

The *Kansas Indians* case was the first to construe the *"Act for Admission of Kansas Into the Union", 12 Stat. 126* ("Kansas Enabling Act"). The pertinent portion of the act states:

> "That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of persons or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until such Tribe shall signify their assent to the President of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property or other rights by treaty, law or otherwise, which would have been competent to make if this act has never past. (*Kansas Enabling Act*, 12 Stat 126)

In the *Kansas Indians* case, the United States Supreme Court recognized that the *Kansas Enabling Act* applied to the tax issues being pressed by the State of Kansas and its tax collectors on Indian reservations. The United States Supreme Court looked directly to the *Kansas Enabling Act,* and interpreted the same to exclude all Indian Reservations from the State of Kansas. The U.S. Supreme Court stated:

> ...Kansas accepted her admission into the family of

> States on the condition that Indian rights should remain unimpaired ... (*Kansas Indians*, 72 U.S. 737, 755.)

In the *Kansas Indians* case, the U.S. Supreme Court recognized that the *Kansas Enabling Act* prohibited the imposition of a state tax on Indian lands: "Kansas accepted her admission into the family of States on the condition that Indian rights should remain unimpaired." *72 U.S. 737, 755.* The Court held that the reservations are extra-territorial to the State of Kansas, and that taxation of reservation lands was prohibited under the Enabling Act. The Kansas Indians was good law in 1866 and remains good law today. It was error for the Tenth Circuit to completely ignore this controlling precedent.

Thus, the *Kansas Enabling Act* is an express federal statute that preempts the imposition of the Kansas motor fuel tax on the Kansas reservations under the federal preemption test in *White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).*

In 1866, just five (5) years after Kansas was admitted to the Union, the Untied States Supreme Court held that Indian reservations in Kansas are not within the reach of the State of Kansas, were not within the territorial boundaries and jurisdiction of the State of Kansas, and that taxation of the same was not allowed. The U.S. Supreme Court ruling in the Kansas Indians decision was good law when it was made, and it is still good law 134 years later. This case is not only good authority – it is the controlling case on this point.

For reasons unknown, the Tenth Circuit did not even address this case. It did not distinguish it, let alone recognize the importance and applicability of the same. This should not be tolerated by this court. For this reason alone, certiorari should be granted.

2. CONFLICT WITH LOWER FEDERAL COURT DECISIONS

At the outset of this section, it should be noted that the arguments for granting certiorari are directed at the Tenth Circuit decision in *Pierce* not at the lower federal district court's decisions. The U.S. Federal District Courts for the District of Kansas have consistently held that the Kansas Indian Reservations are not part of the State of Kansas, not only in the *Pierce* case, but also in two other federal district court cases: *Prairie Band of Potawatomi Indians, et al. v. Raymond Jackman, United States District Court for the District of Kansas, Case No.95-3268,* ("*Jackman*") *and Kickapoo Tribe v. Shoemaker, United States District Court for the District of Kansas, Case No. 99-4059-SAC, ("Shoemaker").*

Before addressing *Jackman and Shoemaker,* it should be noted that the federal district court for the district of Kansas, clearly understood the ramifications of its actions and stated in it December 17, 1998 ruling that the *Kansas Enabling Act* and the *Organic Act* made it "..very clear to the court that the Indian reservations are not to be considered part of the State of Kansas in any way. The plain language of both acts states that 'All such territory shall be excepted out of the boundaries and constitute no part of the territory [state] of Kansas.'" (*Sac and Fox Nation of Missouri vs. Lafaver* 31 F Supp. Sec 298, 1304 (D. KAN. 1998)) ("*Lafaver*").

Counsel submits that the trial court was correct, and the appellate court was wrong in its interpretation of the *Kansas Enabling Act* and the *Organic Act.* The trial court's decisions are in compliance with the *Kansas Indians* decision by the U.S. Supreme Court.

Furthermore, the Kansas federal district court in *Jackman* dealt with taxation of personal property of Indians domiciled on Kansas Indian Reservations. The lower held that the State of Kansas has no jurisdiction over personal property owned by Indians domiciled on Indian reservations. *Jackman* is relied upon by the state and the tribes.

If the *Pierce* decision is allowed to stand, the *Jackman* case will then be overturned by implication, and an entire new area of

personal property taxation law and litigation will be spawned by the *Pierce* decision. All of the issues already litigated in *Jackman* will have to be re-litigated. The *Pierce* case will have a significant effect on personal property taxation in Kansas as well as the Indians domiciled on the Kansas reservations.

The latest interpretation by a Kansas federal district court addressed the power of the Sheriff of Brown County Kansas to seize personal property on the Kickapoo Reservation. In *Shoemaker*, the Sheriff was attempting to exercise civil jurisdiction on the Kickapoo Reservation , but the lower court held that the Sheriff had no authority as a state elected official to serve civil process on the Kickapoo Reservation. A permanent injunction is in force against the State Sheriff from serving civil process on the Kickapoo Reservation. This case is in compliance with the *Kansas Enabling Act* as interpreted in the *Kansas Indians* case.

If *Pierce* is allowed to stand, it will cause all of the civil process issues to be re-litigated, including *Shoemaker*. *Pierce* opens disputes over who has civil jurisdiction in Indian Country spawning more litigation on this point.

Before leaving this area, it should be pointed out that the *Shoemaker* case was filed by the tribe when the Sheriff sent a deputy to the Reservation to seize a vehicle under a state court judgement. On the Kickapoo Reservation, seizure of vehicles is a serious matter, since they have often lead to more than verbal arguments. For these reasons, judicial procedures are required and self help is not allowed on the Kickapoo Reservation. The Kickapoo Tribe requires that its court and its law enforcement officials enforce the seizure of vehicles to avoid the disputes that can escalate beyond verbal abuse and lead to physical violence and use of firearms. To allow *Pierce* to stand would over rule *Shoemaker* and could have a devastating effect upon keeping the peace in Indian Country.

3. DIRECT CONFLICT WITH DECISION BY HIGHEST COURT OF THE STATE OF KANSAS

Pierce is also in direct conflict with the Kansas Supreme Court, the highest court in the state of Kansas, in its decision rendered in 1870 in the case of *Parker v Winsor*, 5 Kan 362 (1870) ("*Parker*"). In that case the State of Kansas noted that Kansas was admitted to the Union with the proviso that Indian lands, territories and rights remain unimpaired. It should be noted that *Parker* is not in conflict with the United States Supreme Court decision in the *Kansas Indians* case, nor it is in conflict with the *Kansas Organic Act* or *Kansas Enabling Act*. The Kansas Supreme Court understood the law and properly interpreted and construed the same in the *Parker* case. *Parker* like the *Kansas Indians* case is still good law and should remain the law of the land – not *Pierce*.

Moreover, thirty-four years later, the Kansas Supreme Court rendered a consistent interpretation of the same language from the *Kansas Organic Act* and the *Kansas Enabling Act* when it concluded:

> The act of congress of May 30, 1854 (10 U.S. Stat. At L., Ch. 59), organizing the territory of Kansas, and also the act of January 29, 1861 (12 U.S. Sta. At L., Ch. 20), admitting Kansas as a state of the union, each in express terms provided that nothing therein should be construed to impair the rights of persons or property then pertaining to the Indians in the territory included in Kansas, so long as the rights of the Indians should remain unextinguished by treaty with the United States, and that all lands in Kansas belonging to the Indians by treaty with the United States were excepted from, and constituted no part of, of the territory of the state of Kansas, unless by treaty of authority of the United States jurisdiction should be extended to the state.... (*In re Now-ge-zhuck, 69 Kan. 410, 413, 76 Pac. 877 (1904)*) ("*Now-ge-zhuck*").

So the court of appeals decision is in direct conflict with *Parker* and

Now-ge-zhuck on the same point of law.

It is interesting to note that the Tenth Circuit did not even address *Parker* or *Now-ge-zhuck* in its *Pierce* decision. This failure to address these two decisions from the highest state court of Kansas is justification enough for granting of certiorari.

4. DIRECT CONFLICT WITH KANSAS ENABLING ACT.

The *Pierce* decision is also an attempt to overrule and change the unique exclusionary language of the *Kansas Enabling Act* – an act of the United States Congress – thereby, depriving these Indian Nations of this law's specific and intentional protection. The *Pierce* Court simply ignores the language of the statute without an analysis of the historical and legislative reasons for this unique protective language. The *Pierce* decision is in direct conflict with the *Kansas Enabling Act's* language and history.

The *Kansas Enabling Act's* language is clear that Indian Reservations are excluded from the territory, jurisdiction and power of the State of Kansas, to wit:

> ...*Provided*, That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said Tribe shall signify their assent to the president of the United States to be included

> within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act has never passed. (*The Act of Admission of Kansas Into the Union", Act of Jan. 29, 1861, ch. 20, §1, 12 Stat. 126.*)

It should be noted that the case of *United States v. McBratney, 104 U.S. 621 (1881)* ("*McBratney*") reinforces the Petitioners position that the Indian reservations are unique and outside the control, territory, and jurisdiction of the state. In *McBratney* the *Colorado Organic Act* had similar language to the *Kansas Organic Act*, but when the Colorado Enabling Act was adopted this unique exclusionary language was dropped, so the result was the inclusion and subjection of the Indian reservations in Colorado to the state's authority. The opposite is true in this case. The exclusionary language was not dropped when Kansas was admitted to the Union, so the Kansas Indian reservations are not subject to the control of the state.

This protective or exclusionary language is unique to the *Kansas Enabling Act* – no other state of the Union was admitted with such exclusionary language – moreover, it was purposeful and necessary to the sovereignty of the Kansas Indian Nations as is seen from a brief examination of the Congressional Record.

When Kansas became a state in 1861, Congress explicitly excepted Indian lands from the jurisdiction and boundaries of the state of Kansas. Congress determined that the excepted language was necessary "...so that no man hereafter, in court or before any other tribunal, shall ever cite the act of admission as evidence that the United States Congress understood at the time that the State could take jurisdiction over these Indian lands." (*Cong. Globe, 36th Cong. 2nd Sess. 473 (1861)*). Congress further stated that "...we

understand at the time we passed the act that we are not subjecting [the tribes] to the jurisdiction of the state of Kansas." (*Id. at 445.*) For a more eloquent statement of the necessity of this protective or excepted language, one can read the words of Senator Smith of Connecticut when the Congress was considering the creation of the Kansas Territory:

> What was the object of these treaties stipulations, not to be included in the limits of any State or Territory. Was it to secure to the Indians there lands? No! Because the treaty declares, in express terms, that they shall be theirs forever. Was it secure to them the right to self-government? Not at all: for the treaties are equally explicit on that point. What, then, was the object of it! It was to protect themselves against the all - corrupting effect of our glittering gold. They had experience the bitter consequences of such seductions before...they knew that if they were included within the limits of any Territory or State, every effort would be made to get away there lands...[This provision insures] there would be no motive, either on the part of the General Government or the people of any State of Territory for disposing them of there lands." (*Congr. Globe, 33d Congress, 1st Sess. 171 (1854)*)

It can not be stated more clearly than Senator Smith did when the *Organic Act* was being debated before Congress. In short, Congress intentionally put in this language to insure that no territory or state would ever have control over the Indian reservations located in what was to become the State of Kansas. This language is obviously necessary to prevent the State and its population taking the land away from the Indians; thereby, destroying their cultures, customs, and the very nature and existence of the tribes. For the Court of Appeals to find otherwise is contrary to the language of the *Organic Act* and the *Enabling Act*, plus it is without any basis in

legislative history.

In 1861 when Kansas was petitioning Congress for admission to the Union as a state, the language of the *Kansas Enabling Act* was as hotly debated as when Kansas petitioned to be a territory of the Union. Again the debate, focused on the exclusionary language: "...We understand that the time we passed the act that we are not subjecting them to the jurisdiction of the State of Kansas..." (*Congr. Globe, 36th Congr. 1st Sess. 445 (1861)*)Congress was concerned that "...Backed by a State government, the people [of Kansas] will take the land away from the Indians, as they did in the State of Georgia." (*Id. p.472*)Furthermore, Congress was determined that the exclusionary clause was necessary and was the most significant and important clause in the same when it stated "...So that no man hereafter in court or before any tribunal, shall ever cite the act of admission as evidence that the United States Congress understood at the time that the State could take jurisdiction over these Indian lands." (Id. p. 472)

In addition, Senator Douglas stated: "We could have never opened that country [Kansas] to settlement at all if these Indian lands were not excepted from the State or Territory. We encountered all these difficulties when the *Kansas - Nebraska Act* [*Organic* Act] was passed, and we adopted this mode of excepting them out to answer their objection..." (Id. p.445)

After these congressional debates, Congress admitted Kansas into the union with the exception or exclusionary language that was included in the *Kansas Enabling Act*. This language is clear and unambiguous – never was Kansas or its people to have control or jurisdiction over Indian reservations in Kansas – no tribunal was ever to take the civil jurisdiction away from the Indians unless they assented thereto. Counsel for these tribes submits that no such assent has ever been given by the tribes before this court, nor will such an assent ever be given, for to do so is to end the very existence of the Tribes.

The Tenth Circuit is clearly outside of any judicial rules of

construction and interpretation, and in direct conflict with this unique congressional act and its clearly documented history. The decision in *Pierce* is not based upon the language of the *Kansas Enabling Act.* It is juxtaposed against the language. It is interesting to note that the *Pierce* decision does not cite the congressional legislative history. The reason is clear, the *Pierce* decision can not be supported by the same and could not be written if the congressional record had been consulted.

The *Pierce* Court is ignoring the language of the controlling Act of Congress. This is not judicially acceptable statutory construction, although it gives the state of Kansas what it wants – control over the Indian Reservations, so the state can tax them into obscurity.

5. DIRECT CONFLICT WITH INDIAN TREATIES

After the passage of the *Kansas Enabling Act,* the only ways that Kansas could ever obtain civil jurisdiction over the Indian Reservations would be by a modification of the language by another act of congress or the Indian Nations assenting thereto in a new treaty. Neither of these events have happened.

The Indian Treaties involved in this case are attached in the Appendix and indicate that all of the Indian lands were to be the Indians' home forever and free from the control of the state of Kansas. This has never changed. These treaties were presented to the lower court and were a part of the appellate record. The court of appeals simply ignored the language of the same.

For example, the October 24, 1832, Kickapoo Treaty negotiated with William Clark, Superintendent of Indian Affairs, states at Art. 2, as follows:

> The United States will provide for the Kickapoo Tribe a country to reside in, Southwest of the Missouri river, as there permanent place of

> residence as long as they remain a tribe. And whereas the said Kickapoo Tribe are now willing to remove on the following condition, from the country seated on Osage river, in the State of Missouri, to the Country selected on the Missouri river, north of lands which have been assigned to the Delawares, it is hereby agreed that the country within the following boundaries shall be assigned, conveyed, and forever secured, and its hereby sole assigned, conveyed, and forever secured by the United States to the said Kickapoo Tribe as there permanent residence.)(*1832 Kickapoo Treaty, Art. 2*)

The Iowa and Sac and Fox Tribes' Treaties have similar language.

Indeed, the Treaties of the three Kansas Tribes petitioning for certiorari contain identical language providing precisely the same guarantees and protections as those of the Wea and Miami Tribes' Treaties that were at issue in the *Kansas Indians, 72 U.S. 737, 759.* The mere passage of time (and perhaps the memory of the original intent and purpose justifying the involuntary herding of Indians on to reservation lands to make way for westward expansion, i.e. "*Manifest Destiny*") should not change this Court's historically relevant interpretation today. This language should be consistently interpreted to exclude the Tribes' respective Indian Reservations from the boundaries of the state of Kansas.

Even in the year 2000, the words of the 1866 U.S. Supreme Court set the precedent, and must be followed:

> While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and

> privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws. (*Kansas Indians, 72 U.S. 737, 757*)

All three (3) tribes take the position that their treaties exclude their lands from the control, supervision, jurisdiction and power of the State of Kansas, and that their treaties have not been modified by negotiation or by an act of Congress that would give the State of Kansas civil jurisdiction on their Indian reservations.

It should be pointed out that the *Kansas Enabling Act* required the affirmative assent by the tribes before jurisdiction could be given to the State of Kansas. The tribes have never given assent to the State of Kansas for exercise of civil jurisdiction on their sovereign Indian reservations. Nor will the Kansas tribes give such assent. For to do so turns the calendar back to the 1850's and the words of Senator Smith will become reality: "...you initiate a policy which will result in the outrageous breach of numerous treaties, which you have made with the Indian Tribe's now having a resting place west of the organized State's. Nay, it is a present violation of those treaties. It will being upon them irremediable calamities, and will, within a few years, consign them to utter annihilation." (Speech by Senator Smith of Connecticut on Congressional floor.) (*Congr. Globe 33d Cong., 1st Sess. 171 (1854)*) In short, fears of congress would become reality "...backed by a state government, the people [of Kansas] will take the land away from the Indians, as they did in the State of Georgia." (*Id.*)

Unless the United States Supreme Court reverses the *Pierce* decision, the social and economic and cultural policy known as "*Manifest Destiny*" of the 19th Century, which created the United States of America and almost destroyed the Indian Cultures and

Tribes in the process, will be fulfilled by destroying the Indian cultures and Tribes in Kansas. Tribes can have no sovereignty without civil jurisdiction over there territory. This issue is of great significance and must be addressed by this court. Otherwise, the Tribes as we know them will cease to exist.

6. THE COURT OF APPEALS MISCONSTRUED THE LAW OF CIVIL JURISDICTION OVER INDIAN RESERVATIONS

The law of jurisdiction in Indian Country is complex to say the least. The Tenth Circuit Court of Appeals is not the first court of appeals that failed to understand the complexity of the same and the interrelationships between treaties, acts of congress, civil jurisdiction, and criminal jurisdiction when it deals with Indian Tribes.

Furthermore, the Tenth Circuit Court of Appeals failed to understand that just because you might have criminal jurisdiction in Indian Country that is concurrent with the federal government, the Tribal government and the State government, it does not follow that you then have similar civil jurisdiction.

In fact, it surprises even skilled Indian attorneys to discover that Kansas is not a Public Law 280 State, but is a unique State that allows concurrent criminal jurisdiction much like PL 280 States, but has retained exclusive civil jurisdiction on its Indian reservations.

The criminal jurisdiction was obtained by an act of Congress specifically "*The Kansas Act*" which provides:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State. (*18 U.S.C. 3243*)

No similar act of Congress exists to confer civil jurisdiction on Indian Reservations to the state of Kansas.

In passing the *Kansas Act*, Congress found that the Tribe's had assented to the state assuming criminal jurisdiction . This point is still vehemently denied by the Tribes.

Without arguing whether or not that assent was actually affirmatively given, the Tribes point out that only by an act of Congress could the Tribes loose there criminal jurisdiction. Judicially this could not be done. The court of appeals may not legislate such an act by its judicial decision in *Pierce*.

In fact, the *Ward* case could not judicially grant the state criminal jurisdiction, which is why *Ward* is not widely cited, and *The Kansas Act* was required even after *Ward* was decided. Had the convicted defendant appealed the decision in *Ward,* it would have been reversed. Unfortunately, the individual defendant did not appeal the decision, so it became the law of that case, and it should remain simply the law of that case and nothing more.

It should be noted that no Indian tribe, let alone, the tribes petitioning this Court, were parties to the *Ward* case. It would seem that due process clause of Ammendment V of the United States Constitution would require them to at least be given notice and a right to be heard before they were stripped of their sovereign powers.

The Tribes have never assented to the state having any civil jurisdiction on their lands. The reliance upon a criminal case, and specifically the *Ward* case, is wholly misplaced. What is said about criminal jurisdiction in *Ward* does not apply to civil jurisdiction; therefore the legal rationale and reliance of the Tenth Circuit on *Ward* is utterly erroneous.

To allow the Tenth Circuit to give the state of Kansas civil jurisdiction over Indian Reservations based on the *Ward* case is in total violation of the sound rules of treaty construction, statutory construction, and the case law of the United States Supreme Court. The *Pierce* court simply misconstrued the complex law of jurisdiction in Indian Country.

CONCLUSION

From the 1830's forward, the policy of the territories and states has been to destroy the Indian Tribes' way of life, take the Indian Tribes' lands, and subject the Indian Tribes to the laws of the territories or states. The dominant State cultures have wanted to eliminate the Indian cultures and the Indian way of life from the 19th century forward. The socio-economic movement labeled "*Manifest Destiny*", which was utilized to justify the conquest of the entire land mass of the United States from the Atlantic to the Pacific, and the supplanting and instilling of the European work ethic and life style, has been an overwhelming drive by the state governments to this date. This may be the 21st Century, but *Manifest Destiny* lives in Kansas.

From the inception of the territory of Kansas through the creation of it as a state government to this date, the state of Kansas has sought to control and destroy the Indian Reservation within its boundaries. The policies of the state of Kansas towards the Kansas Indians are same as they were in 1854 when the Kansas Territory was created and in 1861 when the *Kansas Enabling Act* was passed. The protective language of the *Kansas Enabling Act* was needed then and is still needed today.

In the *Pierce* case, Tenth Circuit hands the State of Kansas the final weapon the state needed to complete the state's *Manifest Destiny* over the Indian lands within its borders. *Pierce* gives the state the ability to complete the dismantling of the he Kansas Indians by controlling their territory and taxing them into obscurity.

The *Pierce* decision is not only an affront to the rules of judicial construction of treaties and in direct conflict with U.S. Supreme Court Decisions, acts of Congress, the *Kansas Enabling Act*, the decisions of the highest court of the State of Kansas, and the lower federal courts in the State of Kansas, but it is also judicially sanctioning ethnic cleansing by the pen instead of the sword.

It is sincerely prayed by these three (3) tribes that this U.S. Supreme Court allow them to retain there exclusive civil jurisdiction, their right to self government, their sovereignty, but most of all their culture and pride of being a member of a Native America Tribe in the State of Kansas and outside of the power, jurisdiction, and oppressive policies of the State of Kansas. The Tribe's specifically request that this court grant a writ of certiorari to correct not only the erroneous legal reasoning of the *Pierce* case, but also the social injustices that will flow therefrom.

If a writ of certiorari is not issued, the three (3) tribe's believe that what Senator Smith feared in the 1850's – complete destruction of the Indians if the states have control over the Indian Reservations – will become a reality in this new millennium. To face this reality as modern Indian Nations with brighter futures is cause for alarm and fear in the hearts of all Native Americans.

Respectfully Submitted:

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Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation, *Petitioners*

v.

Karla Pierce, Secretary, Kansas Department of Revenue, *Respondent*

On Petition For A Writ Of Certiorari
to the United States Court of Appeals for the Tenth Circuit

APPENDIX, VOL. I FOR A WRIT OF CERTIORARI

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APPENDIX I

TABLE OF AUTHORITIES

Court Decisions:

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Decision of the Court of Appeals, Dated May 30, 2000.

Sac and Fox Nation of Missouri v. Pierce

cite as 213 F.3d 566

Sac and Fox Nation of Missouri; Iowa Tribe of Kansas and Nebraska; Kickapoo Tribe of Indians, of the Kickapoo Reservation in Kansas, Plaintiffs-Appellees, v. Karla Pierce, Secretary, Kansas Department of Revenue, Defendant-Appellant.

No. 99-3019

UNITED STATES COURT OF APPEALS

FOR TENTH CIRCUIT

May 30, 2000

John R. Shordike of Alexander & Karshmer (Stephen D. McGiffert and Mark S. Gunnison of Payne & Jones, Chartered, Overland Park, Kansas; Paul Alexander of Alexander & Karshmer, Washington, D.C.; and Mario Gonzalez, Horton, Kansas, with him on the brief), Berkeley, California, for Plaintiffs-Appellees.

John Michael Hale, Special Assistant Attorney General, Legal Services Bureau, Kansas Department of Revenue, Topeka, Kansas, for Defendant-Appellant.

Before BALDOCK, BRORBY, and LUCERO, Circuit Judges.

BALDOCK, Circuit Judge.

The State of Kansas imposes a tax, subject to enumerated exceptions, on the distribution of motor fuel to retailers within the State. Kan. Stat. Ann. 79-3408(a) (1999 Supp.). The distributor, rather than the retailer, is responsible for remitting the tax. Id. 79-3408(c). When the Kansas Department of Revenue announced its intention to begin collecting tax on motor fuel distributions to retail gasoline stations on Indian lands within the State, three federally-recognized Indian Tribes, the Sac and Fox Nation of Missouri; the Iowa Tribe of Kansas and Nebraska; and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas (the Tribes), filed suit in federal district court to enjoin the State from collecting its tax on fuel distributed to the Tribes' retail stations. The principal issue before us is whether the State of Kansas may impose its motor fuel tax as currently designed on fuel distributed to these retail stations on Indian lands within the State.

I.

The facts underlying this case are not in dispute. The Tribes are the beneficial owners of trust lands within the State of Kansas. The United States holds legal title to the lands in trust for the benefit of the Tribes. Each of the Tribes own and operate retail gasoline stations on these lands. The stations are located along or near Kansas state highways. Prior to May 1995, the Kansas Department of Revenue took the position that the motor fuel tax law as written did not permit the State to tax motor fuel distributed on Indian lands. After the Kansas legislature amended the Kansas Motor Fuel Tax Act in 1995, see Kan. Stat. Ann. 79-3401 to 79-3464f (1997), however, the department reversed its position and this litigation ensued.

In their complaint, the Tribes sought declaratory and injunctive relief against the State based upon both federal and

state law. The Tribes invoked the district court's jurisdiction under U.S. Const. art. I, 8, cl. 3 and 28 U.S.C. 1331, 1362, 1367. The Tribes claimed that (1) federal law preempted the motor fuel tax law as *570 applied to the Tribes, (2) the motor fuel tax law as properly construed did not apply to fuel distributed to the Tribes, and (3) imposing the motor fuel tax on the Tribes would irreparably harm their economic viability.

The district court issued both a temporary restraining order, Sac and Fox Nation v. LaFaver, 905 F.Supp. 904 (D.Kan.1995), and a preliminary injunction, Sac and Fox Nation v. LaFaver, 946 F.Supp. 884 (D.Kan.1996), against the State. The district court next denied both the State's motion to dismiss the Tribes' complaint based on sovereign immunity, Sac and Fox Nation v. Lafaver, 979 F.Supp. 1350 (D.Kan.1997), and its motion to reconsider, Sac and Fox Nation v. LaFaver, 993 F.Supp. 1374 (D.Kan.1998). On cross motions for summary judgment, the court entered judgment for the Tribes and permanently enjoined the State from enforcing its motor fuel tax law against the Tribes. Sac and Fox Nation v. Lafaver, 31 F.Supp.2d 1298 (D.Kan.1998).

Addressing a myriad of legal issues, the district court first held the Tribes had standing to pursue their claims against the State. Id. at 1302. Turning to the merits, the court held that (1) tax compacts between the Tribes and State did not prohibit the State from imposing its fuel tax on fuel distributed to the Tribes, id. at 1302-03, (2) the fuel tax exemption for fuel sold or delivered to the United States and its agencies, Kan. Stat. Ann. 79-3408(d)(2) (1999 Supp.), did not encompass the Tribes, Sac and Fox Nation, 31 F.Supp.2d at 1303-04, [FN1] but (3) the fuel tax exemption for fuel exported from the State to territories outside the State did encompass Indian lands:

> FN1. On appeal, the Tribes do not challenge the district court's conclusions that (1) their tax compacts

> with the State of Kansas have expired and are no longer of any legal force, and (2) the fuel tax exemption for fuel sold or delivered to the United States and its agencies does not encompass Indian tribes.

The statute [Kan.-Stat. Ann. 79-3408(d)(1) (1999 Supp.)] exempts any fuel transactions where the fuel is exported "to any other state or territory or to any foreign country." From this reading, the court can only conclude that the intent of the Kansas legislature was to exempt any transaction where the fuel was to be sold outside the boundaries of the State of Kansas. As the Act for Admission of Kansas into the Union [Ch. XX, s.1, 12 Stat. 126 (1861)] ... clearly exclude[s] the Indian reservations from the boundaries of the State of Kansas, it is only reasonable that 79-3408(d)(1) provides for an exemption to the transactions involved in this case where fuel is sold to tribal retailers on the recognized reservations.
Sac and Fox Nation, 31 F.Supp.2d at 1304.

As an alternative basis for issuing a permanent injunction against the State, the court relied on Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), to hold that although the legal incidence of the fuel tax fell on the distributors rather than the Tribes, the balance of tribal and state interests weighed in favor of the Tribes, thus requiring the court to invalidate the tax as applied to the Tribes. Sac and Fox Nation, 31 F.Supp.2d at 1304-08. The district court subsequently denied the State's motion to alter the judgment, Sac and Fox Nation v. Pierce, 45 F.Supp.2d 859 (D.Kan.1999), and the State appealed. Our jurisdiction arises under 28 U.S.C. 1291. We address each of the State's several challenges to the district court's judgment in turn. We reverse the judgment of the district court and remand for further proceedings.

II.

[1] As a preliminary matter, we address the district court's power to adjudicate this case on the merits. The State contends the district court had no jurisdiction over this controversy because (1) the *571 doctrine of sovereign immunity bars the Tribes' suit, and (2) the Tribes' have no standing to maintain their suit. The district court's determination of subject matter jurisdiction is a question of law which we review de novo. Rosette Inc. v. United States, 141 F.3d 1394, 1395 (10th Cir.1998). Applying this standard, we reject the State's jurisdictional contentions, and conclude the district court properly exercised jurisdiction over this cause.

A.

In the district court, the Tribes alleged jurisdiction under U.S. Const. art. I, 8, cl. 3 and 28 U.S.C. 1362, as well as under the general federal question and supplemental jurisdiction statutes, 28 U.S.C. 1331, 1367. The Tribes rely on Article I's Indian Commerce Clause which gives Congress the power "[t]o regulate Commerce ... with the Indian Tribes." Meanwhile, 1362 is a specific grant of jurisdiction to the district court in matters involving Indian tribes: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe ... wherein the matter in controversy arises under the Constitution, law, or treaties of the United States." The State asserts that neither of these provisions is sufficient to overcome the State's sovereign immunity under the Eleventh Amendment, U.S. Const. amend. XI.

[2] The Eleventh Amendment, as construed by the Supreme Court, generally proscribes federal jurisdiction over suits against nonconsenting states unless Congress has abrogated the states' sovereign immunity in a clear and unequivocal manner pursuant to a valid exercise of its power. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54-55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Congress lacks power under Article I to abrogate a state's sovereign immunity from suits brought by private parties.). In Blatchford v. Native Village of Noatak, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), the Supreme Court rejected the notion that the Eleventh Amendment "only restricts suits by individuals against sovereigns, not by sovereigns against sovereigns." Id. at 780, 111 S.Ct. 2578 (emphasis in original). The Court likewise rejected the notion that the states waived their immunity against Indian tribes when they adopted the Constitution: "We have hitherto found a surrender of immunity against particular litigants [inherent in the constitutional compact] in only two contexts: suits by sister States and suits by the United States." Id. at 781-82, 111 S.Ct. 2578 (internal citation omitted). Accordingly, the Court held that the Eleventh Amendment barred an Indian tribe's suit under a state revenue sharing plan against an Alaskan state official, despite the tribe's sovereign status. In so holding, the Court also rejected the notion that 28 U.S.C. 1362 operated as a general waiver of a state's sovereign immunity. Paramount to our analysis, however, was the Court's recognition that in Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), a case involving an Indian tribe's access to federal court "for the purpose of obtaining injunctive relief from state taxation," the Court had reached a different conclusion. Blatchford, 501 U.S. at 784, 111 S.Ct. 2578.

In Moe, the Court upheld an Indian tribe's right to seek injunctive relief from state taxation in federal court. Moe involved, among other things, an attack on Montana's cigarette sales tax as applied to cigarette sales to both Indians and non-Indians on Indian lands. Before reaching the merits, the Court addressed the district court's jurisdiction to entertain the tribe's suit against a Montana sheriff responsible for enforcing the tax. Moe, 425 U.S. at 470-475, 96 S.Ct. 1634. The Court held that 1362 proscribed application of the Tax Injunction Act, 28 U.S.C. 1341, to the tribe's suit. [FN2] The Court first noted *572 that 1341 did not apply to suits "brought by the United States 'to protect itself and its instrumentalities from unconstitutional state exactions.' " Moe, 425 U.S. at 470, 96 S.Ct. 1634 (quoting Department of Employment v. United States, 385 U.S. 355, 358, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966)). From this principle, the Court reasoned:

> FN2. The Tax Injunction Act provides that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. 1341.

Looking to the legislative history of 1362 ... we find an indication of congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought. Section 1362 is characterized by the reporting House Judicial Committee as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." [H.R.Rep. No.2040, 89th Cong., 2d

Sess., 2-3 (1966), U.S. Code Cong. & Admin. News at 3145, 3146- 47]. While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicit jurisdictional limitations, such as 1341, it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under the Constitution, laws, or treaties" would be at least in some respects as broad as that of the United States suing as the tribe's trustee. Id. at 472-73, 96 S.Ct. 1634. See also United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903) (upholding Government's right to seek injunctive relief against county taxation directed at improvements on and tools used to cultivate Sioux Indian lands).

In Moe, the Court concluded that because 1341 would not bar the United States from seeking to enjoin enforcement of the state tax law on the tribe's behalf, the tribe itself could maintain its suit against the state. Moe, 425 U.S. at 474-75, 96 S.Ct. 1634. The Court emphasized that its decision " 'rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection.' " Moe, 425 U.S. at 473, 96 S.Ct. 1634 (quoting Heckman v. United States, 224 U.S. 413, 441, 32 S.Ct. 424, 56 L.Ed. 820 (1912)).

[3] Moe leads us to conclude that we have jurisdiction under 28 U.S.C. 1362 to reach the merits of this case. Surely if an Indian tribe may maintain suit on its own behalf in federal court to enjoin collection of a state's cigarette sales tax, it may maintain a similar suit on its own behalf to enjoin collection of a state's motor fuel distribution tax. Neither the Tax Injunction Act nor the Eleventh Amendment bars the Tribes'

suit in this case. Undoubtedly after Seminole Tribe, the Eleventh Amendment generally bars an Indian tribe's suit in federal court against a state where the tribe's claim rests solely on Article I's Indian Commerce Clause. As the Supreme Court stated in both Blatchford and Moe, however, an Indian tribe's suit for injunctive relief against state taxation occurring on trust lands is another matter. Blatchford expressly recognized what Moe necessarily inferred from 1362. Blatchford explained that in Moe, the Court found in 1362- an implication that a tribe's access to federal court to litigate federal-question cases would be at least in some respects as broad as that of the United States suing as the tribe's trustee. The "respect" at issue in Moe was access to federal court for the purpose of obtaining injunctive relief from state taxation.

Blatchford, 501 U.S. at 784, 111 S.Ct. 2578 (emphasis in original) (internal citations, quotations, and brackets omitted). Accordingly, we conclude that the Eleventh *573 Amendment does not bar the Tribes' suit against the State to enjoin enforcement of the Kansas motor fuel tax law. [FN3]

FN3. The district court relied on the legal fiction established in Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), to overcome the State's claim of sovereign immunity. Sac and Fox Nation, 979 F.Supp. at 1352-54. Under the Ex Parte Young legal fiction, when an official of a state agency is sued in her official capacity for prospective equitable relief, she is generally not regarded as "the state" for purposes of the Eleventh Amendment, and the case may proceed in federal court. See ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1188 (10th Cir.1998). Because we conclude that we have jurisdiction to

reach the merits of this case under 28 U.S.C. 1362, we decline to address the question of Ex Parte Young 's application to matters of state taxation affecting Indian tribes.

B.

We next turn to the question of the Tribes' standing to maintain their suit against the State. The State argues that because the district court determined the legal incidence of the motor fuel tax fell on the distributors rather than on the tribal retailers, Sac and Fox Nation, 31 F.Supp.2d at 1304-07, the Tribes lack standing to challenge the motor fuel tax. According to the State, the law does not confer standing upon the Tribes merely because they either must absorb the overhead cost of the fuel distributed to them or pass the cost along to their consumers.

[4][5][6] The standing inquiry requires us to consider "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The constitutional standing question is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." Id. at 498-99, 95 S.Ct. 2197 (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). The Supreme Court has identified three constitutional standing requirements. A plaintiff must allege (1) a concrete and particularized actual or imminent injury, (2)

which is fairly traceable to defendant's conduct, and (3) which a favorable court decision will redress. Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

[7][8][9] Additionally, the Supreme Court has identified three prudential standing principles. First, a plaintiff generally must assert its own rights, rather than those belonging to third parties. Warth, 422 U.S. at 499, 95 S.Ct. 2197. Second, "a generalized grievance" shared by a large class of citizens normally does not warrant a federal court's exercise of jurisdiction. Id. [FN4] Third, the interests which a plaintiff seeks to protect must "arguably [be] within the zone of interests to be protected by the statute or constitutional guarantee." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

> FN4. In Warth, 422 U.S. at 499, 95 S.Ct. 2197, the Supreme Court indicated that the standing principle against generalized grievances of citizen groups, which implicitly includes taxpayer groups, was prudential rather than constitutional. In Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), however, the Court treated the bar on such lawsuits as constitutional.

[10] We have little difficulty concluding that the Tribes in this case have constitutional standing to maintain their suit against the State. First, the Tribes have alleged particularized

imminent economic injury if the State imposes its motor fuel tax on fuel distributed to the Tribes' retail stations. The Tribes' uncontroverted affidavits, albeit conclusory, support their allegations of injury. See Warth, 422 U.S. at 501, 95 S.Ct. 2197 (plaintiff may submit affidavits to particularize allegations of fact in support of its standing). Second, the Tribes' alleged injury is directly traceable *574 to the State's desire to tax these distributions. Finally, a decision in favor of the Tribes enjoining the State from enforcing the motor fuel tax against their distributors would likely redress the Tribes' alleged injury since most assuredly the distributors responsible for remitting the tax pass the cost of the tax along to the Tribes. See Kan. Stat. Ann. 79-3409 (1999 Supp.) (expressly permitting the distributor to include the cost of the motor fuel tax in its selling price).

[11] We likewise conclude that prudential standing principles do not bar our exercise of jurisdiction in this case. Certainly the Tribes assert their own rights under both federal and state law to be free from the cost of the motor fuel tax, though any decision in their favor undoubtedly will benefit their distributors and consumers as well. Thus, we do not agree with the State's argument that because the district court determined the legal incidence of the motor fuel tax falls upon the distributors rather than the retailers, see id. 79-3408(c) (expressly stating that the incidence of the motor fuel tax is on the distributor), the Tribes' claims amount to little more than a "generalized grievance" shared by all retailers to whom the distributors pass the cost of the tax.

In resolving challenges to state taxation affecting tribal businesses on Indian lands, the Supreme Court has addressed the legal incidence of a tax as a question intertwined with the merits of the case. E.g., California State Bd. of Equalization

v. Chemehuevi Indian Tribe, 474 U.S. 9, 10-12, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) (per curiam) (holding that because the legal incidence of the state's cigarette sales tax fell on non-Indian consumers, the state could require the tribe to collect the tax on the state's behalf); Moe, 425 U.S. at 481-83, 96 S.Ct. 1634 (same). In Chickasaw Nation, 515 U.S. at 459, 115 S.Ct. 2214, the Court recognized that where the legal incidence of a tax falls on non-Indians, the tribe may still be entitled to injunctive relief if federal law preempts state law or the balance of federal, state, and tribal interests favors the tribe. Chickasaw Nation 's balancing requirement implicitly embraces our conclusion that regardless of where the legal incidence of the motor fuel tax falls, the Tribes at the very least have a particularized claim of injury, rather than a "generalized grievance," with respect to the tax sufficient to confer standing upon them. See Moe, 425 U.S. at 468 n. 7, 96 S.Ct. 1634.

Finally, the alleged economic interests of the Tribes in this case are arguably within the zone of interests which federal law seeks to protect. Consistent with the long standing recognition of Indian tribes as "domestic dependent nations," Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831), the federal government has sought to protect tribal self-government from state interference, including state taxation. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). See also 25 U.S.C. 1322(b) (refusing to extend state's general civil jurisdiction over Indians to matters of taxation). The Supreme Court has repeatedly recognized the United States' interest in securing immunity to the Indians from state taxation which threatens Indian tribes' unique status. Moe, 425 U.S. at 473, 96 S.Ct. 1634. Absent congressional consent through statute or treaty, states have no power to directly tax tribal commerce

on tribal lands. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). [FN5] See also California *575 v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-15 & n. 17, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (noting per se rule precluding state jurisdiction absent congressional consent over tribes and tribal members in the "special area of state taxation"). The Indian Commerce Clause gives Congress the power to regulate commerce with Indian tribes. McClanahan, 411 U.S. at 172 n. 7, 93 S.Ct. 1257. Surely the economic interests which the Tribes seek to protect by enjoining application of the State's motor fuel tax are "arguably within the zone of interests to be protected by th[at] ... constitutional guarantee." Camp, 397 U.S. at 153, 90 S.Ct. 827 (emphasis added). Whether the Kansas motor fuel tax as applied interferes with that guarantee is a matter for legitimate judicial inquiry. To that question, we now turn.

FN5. In Rice v. Rehner, 463 U.S. 713, 713, 718-19, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the Court explained:

Congressional authority and the semi-independent position of Indian tribes are two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. Although the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress, we still employ the tradition of Indian sovereignty as a backdrop against which the applicable treaties and federal statutes must be read in our pre-emption analysis.

(internal quotations, citations, brackets and elipses omitted). Of course, in addition to treaties and

statutes, stare decisis requires us to look to Supreme Court and Tenth Circuit decisions to define the limits of state jurisdiction in matters of taxation affecting Indian tribes.

III.

A.

[12] At the outset, the State argues that Congress, through passage of the Hayden-Cartwright Act, 4 U.S.C. 104, has consented to the state's taxing power in this instance. According to the State, 104 cedes taxing jurisdiction to the states on motor fuel distributed on Indian lands. Section 104(a) provides in relevant part:

All taxes levied by any State ... upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State ... within whose borders the reservation affected may be located. Id. 104(a). The State construes the phrase "located on United States military or other reservations" as including Indian lands. See State v. Keeley, 126 F.2d 863, 864-65 (8th Cir.1942) (discussing the history surrounding the enactment of 104). We decline to address the State's 104(a) argument, however, because the State did not properly present the question of 104(a)'s

applicability vis-a-vis the Kansas motor fuel tax to the district court, and thus the district court had no opportunity to consider or decide the question.

[13][14] A federal appeals court generally will not consider an issue raised but not argued in the district court. Rademacher v. Colorado Assoc. of Soil Conserv. Dist. Medical Benefit Plan, 11 F.3d 1567, 1571 (10th Cir.1993). "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." Singleton v. Wulff, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Where the question is one of law, we may relax the general rule if the proper resolution is beyond doubt or injustice might otherwise result. Id. Accord Cavic v. Pioneer Astro Indus., Inc., 825 F.2d 1421, 1425 (10th Cir.1987). But we need not decide an issue otherwise waived simply because it may be "outcome determinative." First Alabama Bank v. First State Ins. Co., 899 F.2d 1045, 1060 n. 8 (11th Cir.1990) (appeals court will decide waived issues "only in instances where strict application of the rule would result in patently unjust results").

In this case, the State raised the 104(a) defense in its answer to the *576 Tribes' complaint, both which were filed in 1995. Never again did the State raise the issue with the district court although it had ample opportunity to do so by way of both its motion to dismiss and its motion for summary judgment, as well as its subsequent motions to reconsider. See Lazzara v. Howard A. Esser, Inc., 802 F.2d 260, 269 (7th Cir.1986) ("A contention included in an answer, but not pressed before the district court, may not be presented on appeal as ground for reversal."). [FN6] Suffice it to say that we are loath to resolve the 104 issue for the first time on appeal. Neither the Supreme Court nor any of the circuit courts of appeals, nor any court as

far as we can discern, has addressed the difficult question of whether Congress intended 4 U.S.C. 104(a) to encompass Indian lands. This being so, injustice would more likely result than not by us deciding the issue without the Tribes having an opportunity first to be heard on the merits in the district court. See Singleton, 428 U.S. at 121, 96 S.Ct. 2868.

> FN6. The State's sole reference to 104 in the district court read as follows:
>
> If this court determines that the incidence of motor fuel tax under Kansas law is at the retail level and such incidence is determined by this court to fall on plaintiffs, the defendant affirmatively asserts that he is authorized by federal law, 4 U.S.C. 104, to impose Kansas motor fuel tax on plaintiffs.
>
> Appellant's App. at 97 (emphasis added). Presumably because the district court held the legal incidence of the motor fuel tax fell on the distributors rather than on the Tribes, the State felt no need to press its "conditional" 104 defense.

B.

[15] The district court relied on a combination of federal and state law to justify its issuance of a permanent injunction against the State. First, the court concluded that under the Act for Admission of Kansas into the Union, Ch. XX, 1, 12 Stat. 126 (1861), Indian lands were not within the boundaries of the State of Kansas. The Act, the court reasoned, "make[s] it very clear ... that the Indian reservations are not to be considered part of the State of Kansas in any way." Sac and Fox Nation, 31 F.Supp.2d at 1304. The court then concluded that because

Indian lands were not within the State, the distributors' motor fuel tax exemption for fuel exported from Kansas "to any other state or territory," Kan. Stat. Ann. 79-3408(d)(1) (1999 Supp.), applied to fuel distributed on Indian lands. Sac and Fox Nation, 31 F.Supp.2d at 1304. Thus, the district court enjoined the State from taxing such distributions. We review the district court's construction of federal and state law de novo. United States v. LaHue, 170 F.3d 1026, 1028 (10th Cir.1999). Applying this standard, we believe the district court misconstrued the 1861 Act for Admission, and thus misapplied the statutory exemption to the Kansas motor fuel tax.

[16] The 1861 Act for Admission of Kansas into the Union provides [N]othing contained in the said constitution respecting the boundary of said State shall be construed ... to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas. 12 Stat. 127 (emphasis added). [FN7] To our knowledge, the only federal decision construing the applicable provision of the 1861 Act is United States v. Ward, 28 F. Cas. 397 (C.C.D.Kan.1863) (No. 16,639). Ward involved the question of the United States' criminal jurisdiction over the murder trial *577 of a non-Indian defendant whose victim was also non-Indian. The murder occurred on lands of the Kansas Tribe of Indians within the external boundaries of the State of Kansas. Holding the State of Kansas, not the United States, had jurisdiction over the matter, Supreme Court Justice Miller, riding circuit, reasoned that under the Act, all territory not previously exempted from the boundaries of the State of Kansas by treaty between the United States and an Indian tribe

"was included within the state, within its jurisdiction and within its territory; and this irrevocably, unqualifiedly, and exclusively." Id. at 399.

FN7. The Organic Act of 1854, Ch. LIX, s.19, 10 Stat. 284, which established the Territory of Kansas, contains nearly identical language. We need not consider in detail the Organic Act because our construction of the Act for Admission controls our construction of the Organic Act. See United States v. Ward, 28 F. Cas. 397, 398 (C.C.D.Kan.1863) (No. 16,639).

We agree with Justice Miller's able construction of the 1861 Act for it is consistent with the Act's plain language. The Act for Admission excludes from the boundaries of the State of Kansas only those lands which Indian tribes reserved unto themselves "by treaty" with the United States. The Tribes fail to identify any language in any of the treaties provided us which we might construe as excluding their lands from the boundaries of the State. See Aplt's App. at 176-200. The Tribes argue, however, that the question is not whether the Indian lands at issue in this case are independent territories separate from the State for all purposes. Instead, they contend "[t]he question is whether Indian country is excluded from the legal territory of Kansas for purposes of motor fuel taxation." Aples' Br. at 26 (emphasis in original).

[17] In a decision apparently overlooked by both the State and the Tribes, the Kansas Supreme Court resolved this very question in Kaul v. State Dept. of Revenue, 266 Kan. 464, 970 P.2d 60 (1998), cert. denied, --- U.S. ----, 120 S.Ct. 46, 145 L.Ed.2d 41 (1999). In Kaul, fuel retailers with businesses located on Indian lands claimed an exemption from the motor

fuel tax under 79-3408(d)(1), which provides: "No tax is hereby imposed upon or with respect to the ... sale or delivery of motor-vehicle fuel ... for export from the state of Kansas to any other state or territory...." Kan. Stat. Ann. 79-3408(d)(1) (1999 Supp.). The retailers made precisely the same argument as do the Tribes in this case. The Kansas Supreme Court rejected the argument, holding that "the exemption from taxation provided by K.S.A. 79-3408(d)(1) did not apply to the retailers because Indian reservations within the boundaries of the State are not included as territories outside the boundaries of Kansas." Kaul, 970 P.2d at 66-67. Of course, absent some conflict with federal law or overriding federal interest, the Kansas Supreme Court's interpretation of 79-3408(d)(1) is binding on us. See Wainwright v. Goode, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983). We conclude that neither the Act for Admission of Kansas into the Union, nor the statutory exemption contained in 79-3408(d)(1), lends any support to the Tribes' challenge to the Kansas motor fuel tax law.

C.

As an alternative basis for issuing a permanent injunction against the State, the district court applied the balancing of interests test endorsed in Chickasaw Nation, 515 U.S. at 459, 115 S.Ct. 2214: "[I]f the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." Before balancing the parties' respective interest, however, the district court concluded that the legal incidence of the Kansas motor fuel tax fell on the distributors

rather than on the Tribes. Sac and Fox Nation, 31 F.Supp.2d at 1304-07. As the district court recognized, if the legal incidence of the fuel tax falls on the Tribes for sales made on Indian lands, the fuel tax is unenforceable absent congressional consent:

[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead *578 of a balancing inquiry, "a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians." Chickasaw Nation, 515 U.S. at 458, 115 S.Ct. 2214 (internal brackets and quotations omitted) (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)). See also Cabazon Band, 480 U.S. at 215 n. 17, 107 S.Ct. 1083 (noting that where the legal incidence of a tax falls upon the tribe or its members, rebalancing the state and tribal interests in every case is unnecessary because "the federal tradition of Indian immunity from state taxation is very strong and the state interest in taxation is correspondingly weak"). Accordingly, we now turn to the question of who bears the motor fuel tax law's legal incidence.

1.

[18][19] For our purposes, the question of where the legal incidence of the Kansas motor fuel tax rests is one of federal law. See United States v. Mississippi Tax Comm'n, 421 U.S. 599, 609 n. 7, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121 -122, 74 S.Ct.

403, 98 L.Ed. 546 (1954). Otherwise, "a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign." Kern-Limerick, 347 U.S. at 121, 74 S.Ct. 403. But see Mescalero Apache Tribe v. O'Cheskey, 625, F.2d 967, 968-69 (10th Cir.1980) (en banc) (citing Kern-Limerick for the proposition that in federal court, "[t]he holding of a state court as to the incidence of a [state] tax is generally determinative" of the issue) (emphasis added). Federal courts are duty bound to decide for themselves "facts and constructions" upon which federal issues turn. Kern-Limerick, 347 U.S. at 121, 74 S.Ct. 403. To determine whether the motor fuel tax transgresses federal law, we first "look through form and behind labels to [the] substance" of state law. City of Detroit v. Murray Corp., 355 U.S. 489, 492, 78 S.Ct. 458, 2 L.Ed.2d 441 (1958). Mindful of how the tax operates under state law, we then apply federal standards to determine where the legal incidence of the tax rests. See Kern-Limerick, 347 U.S. at 121-22, 74 S.Ct. 403.

[20][21] According to the Supreme Court, the legal incidence of a tax does not always fall upon the entity legally liable for payment of the tax. Mississippi Tax Comm'n, 421 U.S. at 607-10, 95 S.Ct. 1872. Rather, the legal incidence of a tax falls upon the entity or individual necessarily responsible for paying the tax under the taxing statutes. Id. In the absence of dispositive language indicating upon whom the legal incidence of a tax rests, "the question is one of 'fair interpretation of the taxing statute as written and applied.' " Chickasaw Nation, 515 U.S. at 461, 115 S.Ct. 2214 (quoting Chemehuevi Tribe, 474 U.S. at 11, 106 S.Ct. 289). Applying these principles, we agree with the district court that the legal incidence of the tax law as presently written falls on the fuel distributors rather than on the Tribes. [FN8] But see Kaul, 970 P.2d at 67-69

(suggesting that the legal incidence of the Kansas motor fuel tax fell on the retailers where the *579 distributors itemized the tax on retailers' bills as money due the State).

> FN8. The State makes no counterclaim against the Tribes for taxes past due under the Kansas Motor Fuel Tax Act, nor could it because the legal incidence, and thus liability for payment of the tax, falls on the distributors. Even if the legal incidence of the tax fell on the Tribes, no such action would lie because the doctrine of sovereign immunity bars the State from seeking recourse against the Tribes. See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509-14, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (absent clear waiver or congressional authorization, the sovereign immunity doctrine bars suits against Indian tribes). Accordingly, we express no opinion on the legal incidence of the fuel tax prior to the 1998 amendments to the Act. See Kan. Stat. Ann. 79-3401 to 79-3464f (1997).

The Kansas Motor Fuel Tax Act provides that "[a] tax per gallon or fraction thereof, at a rate computed as prescribed ... is hereby imposed on the use, sale or delivery of all motor vehicle fuels ... which are used, sold or delivered in this state for any purpose whatsoever." Kan. Stat. Ann. 79- 3408(a) (1999 Supp.). Section 79-3408c appears to place a fuel tax upon both licensed distributors and retailers: "A tax is hereby imposed on the use, sale or delivery of all motor vehicle fuel ... by any licensed distributor or licensed retailer...." Id. 79-3408c(a). Notably, however, subsection (c) of 79-3408c

excludes the Tribes from the retail tax: "The provisions of this section shall not apply to any licensed retailer who is native American whose licensed place of business or businesses are located on such retailer's reservation nor to any native American tribes having licensed places of business or businesses located on such tribe's reservation." Id. 79-3408c(c). Perhaps most importantly, subsection 79-3408(b) provides that "the incidence of this [motor fuel] tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once." Id. 79- 3408(b).

Despite their lack of legal liability for payment of the motor fuel tax, the Tribes argue the legal incidence of the tax falls upon them because the distributors simply pass on the cost of the tax to the Tribes in the wholesale price. To be sure, the motor fuel tax law presumes distributors will include the cost of the tax in their wholesale price to the Tribes. Section 79-3409 provides: "Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor vehicle-fuels ... sold or delivered by such distributor, as a part of the selling price." Id. 79- 3409 (emphasis added). But 79-3409 also presumes that retailers will pass the cost of the tax along to their consumers: "When the price of motor vehicle fuels or special fuels ... posted on a price sign does not include the state and federal tax which such retail dealer's distributor paid or for which the distributor was liable, the total of the taxes must be shown in numbers the same size as the price of the motor fuel." Id.

Significantly, the law's pass-through provision about which the Tribes complain is permissive rather than mandatory. Compare Kern-Limerick, 347 U.S. at 111, 74 S.Ct. 403 (holding unconstitutional, as applied to sales to the United

States, a state sales tax statute which purported to tax the seller, but provided that the seller "shall collect the tax levied hereby from the purchaser"). Section 79-3409 does not require distributors to pass the cost of the motor fuel tax to retailers; it simply permits them to do so by stating the obvious. Even in the absence of 79-3409, distributors could (and most assuredly would) pass along the cost of the fuel tax to retailers; but it is not necessary that they do so. As we said of an Oklahoma beer tax imposed on wholesalers who sold beer to tribal retailers on tribal lands: Even if it were true that the economic burden of the tax falls on the Tribe because the wholesalers simply incorporate the tax into the wholesale cost, this would not be determinative of the question of the legal incidence of the tax. Just as a nondiscriminatory tax imposed on a private entity that does business with the United States and that passes the cost of that tax on to the United States does not violate federal sovereign immunity, so a nondiscriminatory tax imposed on non-exempt private entities that do business with Indian tribes and that pass the cost of those taxes on to the tribes does not violate tribal sovereign immunity. Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964, 970 (10th Cir.1994) (emphasis added) (internal citations omitted), aff'd in part, rev'd in part on other *580 grounds, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

The Tribes ask us to substitute economic assumptions for the language of the Kansas statutes. But "[t]he question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed." Id. at 972. "[F]ocus on a tax's legal incidence accommodates the reality that tax administration requires predictability." Chickasaw Nation, 515 U.S. at 459-60, 115 S.Ct. 2214. "[I]f a State is unable to enforce a tax because the legal incidence

of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." Id. at 460, 115 S.Ct. 2214.

Certainly, if the fuel tax law required distributors to include the amount of the fuel tax in their wholesale price, we would be justified in concluding that the legal incidence of the tax falls upon the Tribes. See Chickasaw Nation, 31 F.3d at 971. [FN9] But the law does not require distributors to charge retailers the cost of the tax. Kansas law expressly states that the legal incidence of the motor fuel tax is upon the distributors and they are responsible for remitting the tax. Kan. Stat. Ann. 79-3408(c) (1999 Supp.). See Moe, 425 U.S. at 482, 96 S.Ct. 1634. Moreover, the law expressly exempts the Tribes from the requirements of any retail fuel tax. Id. 79-3408c(c). We conclude a fair reading of the motor fuel tax law supports the district court's determination that as applied in this case the legal incidence of the motor fuel tax falls upon the distributors.

FN9. In Chickasaw Nation, we held that the legal incidence of an Oklahoma motor fuel tax fell on the tribal retailers because the governing statutes indicated that the distributors remitted the fuel tax "on behalf of" licensed retailers. 31 F.3d at 971-72. The Supreme Court agreed with our construction of the Oklahoma statutes. Chickasaw Nation, 515 U.S. at 461-62, 115 S.Ct. 2214. Contrary to the Tribes' assertions, we cannot reasonably construe the Kansas statutes as requiring distributors to collect and remit the motor fuel tax "on behalf of" the tribal retailers.

[22][23][24][25] In the alternative, the Tribes argue that even if the legal incidence of Kansas' motor fuel tax falls upon the distributors, the Indian Trader Statutes, 25 U.S.C. 261-264, constitute a comprehensive federal statutory scheme which preempts the State's fuel tax law. See Chickasaw Nation, 515 U.S. at 459, 115 S.Ct. 2214 (if the legal incidence of a tax falls on non-Indians, a state may assess the tax if the balance of interests weighs in favor of the state "and federal law is not to the contrary") (emphasis added). Although the Tribes raised and argued the trader statutes' applicability in the district court, the court appears to have referred to the issue only cursorily. Sac and Fox Nation, 946 F.Supp. at 889 (order granting preliminary injunction). While the question of the trader statutes' applicability is not wholly separate from the balancing inquiry, see Department of Taxation and Finance v. Milhelm Attea & Bros., 512 U.S. 61, 73, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994), we address this issue before we proceed to our discussion of the balancing of interests. [FN10] We review federal statutes de novo. Ben Ezra, Weinstein, and Co. v. America Online, Inc., 206 F.3d 980, 984 (10th Cir. 2000). We conclude that the *581 Kansas motor fuel tax law is not inconsistent with the Indian Trader Statutes. [FN11]

FN10. In Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., the Court explained:

> Resolution of conflicts of this kind [a challenge to state regulations allegedly preempted by the trader statutes] does not depend on rigid rules or on mechanical or absolute conceptions of state or tribal

sovereignty, but instead on a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. 512 U.S. 61, 73, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) (internal brackets and quotations omitted).

FN11. As a preliminary matter, we note that the actual Indian traders subject to the motor fuel tax, i.e., the wholesale fuel distributors, are not parties to this suit. Thus, the question of their joinder necessarily arises, see Fed.R.Civ.P. 19, and we address it sua sponte. While it might have been preferable to join the distributors as parties in the district court (at least for purposes of adjudicating the question of the traders statutes' applicability), neither the State nor the Tribes ever raised that possibility over the course of four years of district court litigation. Nor did the distributors, who surely are apprised of this litigation, seek to intervene. While the distributors appear to be necessary parties under Rule 19(a), they technically are not indispensable parties under Rule 19(b) because their joinder appears feasible, that is to say the distributors may be joined without destroying our subject matter jurisdiction over this cause. See Provident Tradesmens Bank v. Patterson, 390 U.S. 102, 118-119 & n. 15, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

Nevertheless, at this late date we are unwilling to require the distributors' joinder because pragmatic considerations dictate otherwise. See id. at 106-107,

88 S.Ct. 733. First, the State is foreclosed from asserting the non-joinder issue for the first time on appeal and cannot now be heard to complain of possible relitigation with the distributors or possible inconsistent obligations. See id. at 110, 88 S.Ct. 733; Martin v. Wilks, 490 U.S. 755, 765, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (burden is on the parties to a lawsuit to join necessary additional parties). Second, any judgment we render regarding the trading statutes is nonbinding as to the distributors in the context of res judicata. See Provident Tradesmens, 390 U.S. at 110, 88 S.Ct. 733. Third, the preference for joinder in the district court on efficiency grounds has all but disappeared at this late date. See id. at 116, 88 S.Ct. 733. We simply find no compelling reason to set aside the district court's judgment in this case on the basis of the distributors' non-joinder "just because [the judgment] did not theoretically settle the whole controversy." Id.

Consistent with its power under the Indian Commerce Clause, U.S. Const. art. I, 8, cl. 3, Congress enacted the Indian Trader Statutes "to prevent fraud and other abuses by persons trading with Indians." Milhelm Attea, 512 U.S. at 70, 114 S.Ct. 2028. The statutes give the Commissioner of Indian Affairs seemingly broad power to regulate trade with Indian tribes. Specifically, 25 U.S.C. 261 states: The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

In Warren Trading Post v. *Arizona Tax Comm'n*, *380 U.S.* 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), the Court interpreted the trader statutes to bar state taxation of federally licensed retail Indian traders "on their sales to reservation Indians on a reservation." Id. at 690, 85 S.Ct. 1242 (emphasis added). See also Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160, 161-66, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980) (barring the state from taxing unlicensed retailer's sale of farm machinery to the tribe on its reservation). Subsequently, in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Court held that a comprehensive federal regulatory scheme (unrelated to the trader statutes) governing the harvest of Indian timber preempted Arizona's "use fuel" tax law as applied to a logging contractor operating exclusively on federal and tribal roads within the reservation. Id. at 145-53, 100 S.Ct. 2578. Balancing the parties' respective interests, the Court concluded:

The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that [the State's] generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber. Id. at 150, 100 S.Ct. 2578.

More recently, in Milhelm Attea, the Court narrowed its interpretation of the *582 trader statutes. In that case, the Court upheld a state regulatory scheme that imposed recordkeeping requirements and quantity limitations on cigarette wholesalers who sold untaxed cigarettes to reservation Indians. The Court relied on its decisions in Moe, 425 U.S. at 463, 96 S.Ct. 1634, and Washington v.

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), to reject "the submission that 25 U.S.C. 261 bars any and all state-imposed burdens on Indian traders." Milhelm Attea, 512 U.S. at 74, 114 S.Ct. 2028. In Moe, 425 U.S. at 481- 83, 96 S.Ct. 1634, the Court upheld Montana's requirement that tribal retailers collect a cigarette sales tax validly imposed on non-Indian consumers. In Colville, 447 U.S. at 150-161, 100 S.Ct. 2069, the Court upheld the State of Washington's similar but more detailed tobacco sales tax against a tribal challenge. From these decisions, the Court reasoned that "[i]t would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves, but that similar burdens could not be imposed on wholesalers who often ... are not." Milhelm Attea, 512 U.S. at 74, 114 S.Ct. 2028. [FN12]

FN12. In Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the Court held that sovereign immunity barred the State of Oklahoma's suit against a tribe to recover cigarette taxes owed for sales to non-Indians at the tribe's convenience store located on the reservation. In addressing alternative remedies for the State, the Court stated:

[U]nder today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, Colville, supra, at 161-162, 100 S.Ct. 2069, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n, 898 F.2d

122 (C.A.10 1990). Citizen Band, 498 U.S. at 514, 111 S.Ct. 905 (emphasis added).

Our en banc decision in O'Cheskey, 625 F.2d at 967, decided after Warren Trading and Central Machinery, is consistent with the Supreme Court's narrowing of the Indian Trader Statutes in Milhelm Attea. In O'Cheskey, the State of New Mexico imposed its gross receipts tax on contractors who had done construction work for the Mescalero Apache Tribe on reservation lands. We upheld the tax on the contractors despite the presence of an indemnity agreement under which the tribe agreed to indemnify the contractors for the tax. O'Cheskey, 625 F.2d at 969. Rejecting the tribe's argument that the Indian Trader Statutes preempted the state tax, id. at 990-91, we noted that nothing in the record indicated the contractors performed all their work on the reservation. Id. at 968. We reasoned that the legal incidence of the tax was on the contractors, and concluded:

An indirect burden obviously is initially on the one for whom the services are performed-thus on the Tribe or the Government. However, it is equally apparent that this indirect burden is again passed on to the users of the resort and again by them. The tax becomes dispersed. There is no way of telling where the ultimate economic burden falls. This is the reason why the initial incidence of the tax must be the determinative factor. It is the only significant matter for our consideration. O'Cheskey, 625 F.2d at 970.

Unlike Warren Trading and its progeny, the Kansas motor fuel tax law does not impose a tax upon retail traders for trading with Indians. Milhelm Attea, 512 U.S. at 74, 114 S.Ct. 2028. Unlike White Mountain Apache Tribe, no comprehensive

federal regulatory scheme governs the wholesale distribution of motor fuel to Indian tribes. Rather, the Kansas motor fuel tax law imposes a non-discriminatory tax on all wholesale fuel distributors for fuel distributions to retailers within the State of Kansas-Indian or otherwise. Nothing in the record indicates the Tribes' *583 distributors distribute all their fuel, or even a significant portion of it, to the Tribes. See O'Cheskey, 625 F.2d at 968. Thus, the threat of the distributors perpetrating fraud or abuse upon the Tribes appears negligible. See Milhelm Attea, 512 U.S. at 70, 114 S.Ct. 2028. Based upon the foregoing authorities, we conclude that the Indian Trader Statutes do not so pervade the field that they preempt the Kansas motor fuel tax, the legal incidence of which falls upon the distributors and which imposes only an indirect burden on the Tribes. The only remaining question in this case then is whether the indirect economic burden of the motor fuel tax constitutes such an interference with the Tribes' internal affairs as to be unlawful under Chickasaw Nation 's balancing of interests test.

3.

[26] The district court concluded that the balance of tribal and state interests weighed in favor of the Tribes because (1) the State "would clearly not suffer a great deal of harm if it were enjoined from collecting the tax" on fuel distributed to the tribal retailers, but (2) if imposed, the tax "will have a real and direct impact on the tribes' incomes." Sac and Fox Nation, 31 F.Supp.2d at 1307. Accordingly, the court granted the Tribes' motion for summary judgment and invalidated the motor fuel tax "as it relates to transactions involving tribal retailers." Id. at 1308. We review the grant of summary judgment de novo.

Seamons v. Snow, 206 F.3d 1021, 1026 (10th Cir.2000). We conclude the district court overlooked the dictates of Supreme Court precedent and thus failed to adequately develop the factual record before balancing the parties' respective interests.

[27] The Tribes' primary argument in this case is economic. See Aples' App. at 20-49 (affidavits of tribal members). The Tribes assert that the motor fuel tax jeopardizes their retail fuel sales and other revenues generated by those sales at their convenience stores located on tribal lands which support essential tribal services to their members. Both the Sac and Fox and Kickapoo Tribes also impose a tribal tax on their retail sale of fuel, generating still further revenues. According to the Tribes, if the State is allowed to tax the Tribes' fuel distributors, the wholesale cost of fuel to the Tribes will necessarily increase and the revenues from their retail stores will correspondingly decrease, interfering with their sovereign right to self-government.

This is largely the same argument the Supreme Court addressed and rejected in Colville, 447 U.S. at 154-59, 100 S.Ct. 2069, where the State of Washington sought to impose a cigarette sales tax on on-reservation purchases by nonmembers of the Tribes. In Colville, the Court phrased the issue as "whether an Indian tribe ousts a State from any power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transactions or by otherwise earning revenues from the tribal business." Colville, 447 U.S. at 138, 100 S.Ct. 2069. The Court phrased the Tribes' argument as follows:

If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-a-vis businesses

in surrounding areas. Indeed, because the Tribes themselves impose a tax on the transaction, if the state tax is also collected the price charged will necessarily be higher and the Tribes will be placed at a competitive disadvantage as compared to businesses elsewhere. Tribal smokeshops will lose a large percentage of their cigarette sales and the Tribes will forfeit substantial revenues. Because of this economic impact, it is argued, the state taxes are (1) pre-empted by federal statutes regulating Indian affairs; (2) inconsistent with the principle of tribal self-government; and (3) invalid under negative implications of the Indian Commerce Clause. Id. at 154, 100 S.Ct. 2069 (emphasis in original). The Court was unpersuaded: *584 It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservations borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere. Id. at 155, 100 S.Ct. 2069.

We are well aware that the tax at issue in Colville was a sales tax imposed down stream on purchases made by non-tribal consumers only. Because the legal incidence of the tax in Colville fell on the purchaser, the state had no power to tax

tribal members making purchases on the reservation. See Chickasaw Nation, 515 U.S. at 453, 115 S.Ct. 2214. In our case, the legal incidence of the motor fuel tax is imposed up stream on the wholesale distributor and no exemption is allowed for retail fuel sales to tribal members. [FN13] Important similarities, however, also exist between Colville and this case-(1) a tax the legal incidence of which falls on non- Indians and (2) tribal complaints based on the realities of the marketplace. In both cases, the ultimate economic burden of the tax most assuredly falls on the consumer.

> FN13. A prior version of the motor fuel tax law exempted from the tax-
>
> The sale or delivery of motor-vehicle fuel ... to the United States of America and such of its agencies as are not or hereafter exempt by law from liability to state taxation, except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel ... is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel ... is sold or delivered to a nonmember of such reservation. Kan. Stat. Ann. 79-3408g(d)(2) (1997) (repealed).

We acknowledge that Kansas' motor fuel tax law as presently applied might sweep too broadly. In other words, if a substantial portion of the Tribes' retail fuel sales are to tribal members, the Tribes' argument that the indirect burden of the fuel tax improperly interferes with their internal affairs would not be without force. Based on the record before us, however, we are unable to discern what portion of tribal fuel sales are to tribal members as opposed to consumers traveling from outside Indian land. [FN14] Compare Colville, 447 U.S. at

145, 100 S.Ct. 2069 (noting that Indian tobacco dealers made a "large majority" of their reservation sales to non-Indians seeking to take advantage of the claimed tribal exemption from the state's cigarette sales tax).

> FN14. In his affidavit, Corbin Shuckahosse, Chairperson of the Sac and Fox Nation, states:
>
> [T]he pricing of the [Tribe's] fuel draws customers into the Trad'N Post, as the sale of other miscellaneous items at the Trad'N Post ... is also attributable to the fuel sales. Without the draw of the lost-cost fuel, customers would no longer bring their business to the Trad'N Post, and the additional revenue would be lost to the Nation.
>
> Aples' App. at 21. Similarly, Nancy Bear, Chairperson of the Kickapoo tribe, attests-
>
> [T]he sale of [fuel and oil] products draws customers and creates business that also generates the sale of other miscellaneous items.... Without the draw of the sale of fuel at a competitive price, customers would no longer bring their business to the Kickapoo Tribe Trading Post and the additional revenues from the trading post would be lost to the Tribe. Id. at 25.

While we are not unsympathetic to the Tribes' quandary, the Supreme Court has *585 never "gone so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses." Colville, 447 U.S. at 155, 100 S.Ct. 2069. In fact, a tax on non-Indians "may be valid even if it seriously disadvantages or eliminates

the Indian retailer's business with non-Indians." Id. at 151, 100 S.Ct. 2069 " [T]he Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." Id. at 151 n. 27, 100 S.Ct. 2069.

To be sure, the Tribes have an interest in raising revenues to support essential tribal services to benefit their members. "That interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." Id. at 156-57, 100 S.Ct. 2069. At the same time, "Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system." ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1193 (10th Cir.1998). A state's interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." Colville, 447 U.S. at 157, 100 S.Ct. 2069. [FN15]

> FN15. The express purpose of the motor fuel tax appears to benefit all who use the public highways in the State of Kansas-wholesalers who deliver the fuel over state highways, retailers whose businesses are located on or near state highways, and consumers who drive on state highways:
>
> Purpose of tax. The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways ... and

for no other purpose whatever.

Kan. Stat. Ann. 79-3402 (1999 Supp.).

Like the tribe's cigarette sales in Colville, in this case the revenues resulting from the Tribes' retail fuel sales to non-Indian consumers traveling from outside Indian lands is not derived from value "generated on the reservations by activities in which the Tribes have a significant interest." Id. at 155, 100 S.Ct. 2069. Although the result of the motor fuel tax may be to lessen, or even eliminate, tribal commerce with non-members, that market exists only because of the Tribes' claimed exemption from the fuel tax. See id. at 157, 100 S.Ct. 2069. However, until the Tribes provide us with verifiable projections based upon historic statistics indicating what portion of the Tribes' retail fuel sales is made to tribal members as compared to the general public, see Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 128, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993) (remanding for a determination of "whether the tribal members on whom Oklahoma attempts to impose its income and motor vehicle fuel taxes live in Indian country"), and what the precise economic realities of the situation are both in the presence and absence of the motor fuel tax, we cannot adequately balance the federal, tribal, and state interests as Supreme Court authority at this point requires. [FN16] But see Colville, 447 U.S. at 176-181, 100 S.Ct. 2069 (Rehnquist, J., dissenting in part) (criticizing the balance of interests test as too fact specific and endorsing an inquiry based solely on congressional intent). In this regard, we note that on remand the burden is on the Tribes to show whether and to what extent the motor fuel tax would burden commerce derived from value generated on Indian lands. See id. at 157-58, 100 S.Ct. 2069 (placing burden on the tribe to show that absent a credit for

tribal taxes paid, business at the smokeshops would be significantly reduced).

FN16. Because the district court considered only the enforceability of the Kansas motor fuel tax on its face, we do not address the question of whether the tax, even if it survives Chickasaw Nation 's balancing test generally, is invalid insofar as it is applied to fuel sold by the Tribes to customers who are tribal members and reservation residents. See Moe, 425 U.S. at 480-81, 96 S.Ct. 1634. We leave consideration of that question in the first instance to the district court on remand.

Accordingly, the judgment of the district court is REVERSED and this cause REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAC AND FOX NATION OF
MISSOURI; IOWA TRIBE OF KANSAS
AND NEBRASKA; THE KICKAPOO
TRIBE OF INDIANS, of the Kickapoo
Reservation in Kansas,

Plaintiffs - Appellees,

v. No. 99-3019

KARLA PIERCE, Secretary Kansas Department of Revenue,

Defendant - Appellant.

ORDER

Filed July 14, 2000

Before BALDOCK, BRORBY, and LUCERO, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Amy Frazier
Deputy Clerk

Decision of the District Court, Dated March 15, 1999

Sac and Fox Nation of Missouri v. Pierce

cite as 45 F.Supp.2d 859

Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, Plaintiffs, v. Karla Pierce, Secretary, Kansas Department of Revenue, Defendant.

No. Civ.A.95-4152-DES

United States District Court, D. Kansas.

March 15, 1999.

Mark S. Gunnison, Stephan D. McGiffert, Payne & Jones, Chtdl, Overland Park, KS, John R. Shordike, Patricia Prochaska, Berkeley, CA, Paul Alexander, Alexander & Karshmer, Washington, DC, Pedro L. Irigonegaray, Robert V. Eye, Irigonegaray & Associates, Topeka, KS, Mario Gonzalez, Horton, KS, for Plaintiffs.

Amy Weller Liebau, Hinkle, Eberhart & Elkouri, L.L.C., Wichita, KS, John Michael Hale, Jason L. Reed, Kansas Department of Revenue, Bureau of Legal Services, Topeka, KS, for Defendants.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on the defendant's Motion for Reconsideration (Doc. 103) of the court's Memorandum and Order dated December 17, 1998, which granted the plaintiffs' motion for summary judgment and denied the defendant's motion for summary judgment. Both parties have submitted briefs on this matter and the court is ready to rule.

I. FACTUAL BACKGROUND

The plaintiffs, who are all federally recognized Indian tribes located in the state of Kansas, filed suit seeking an injunction to prevent the defendant from collecting taxes from motor-fuel distributors for fuel sold to the plaintiffs. On December 17, 1998, the court issued an order granting the plaintiff's motion for summary judgment and denying the defendant's motion for summary judgment. The court also issued a permanent injunction against the defendant, preventing the collection these taxes. The defendant filed the current motion asking the court to reconsider its previous order.

II. STANDARD FOR A MOTION FOR RECONSIDERATION

A motion for reconsideration provides the court with an opportunity to correct "manifest errors of law or fact and to review newly discovered evidence." Dees v. Wilson, 796 F.Supp. 474, 475 (D.Kan.1992). A court has discretion whether to grant or deny a motion for reconsideration. Hancock v. City of Oklahoma City, 857 F.2d 1394, 1395 (10th Cir.1988). There are three circumstances in which a court may appropriately grant a motion for reconsideration: (1) where the court made a manifest error of fact or law; (2) where there is newly discovered evidence; and (3) where there has been a change in the law. Renfro v. City of Emporia, Kan., 732 F.Supp. 1116, 1117 (D.Kan.1990).

A motion for reconsideration is not to be used as a vehicle for the losing party to rehash arguments previously considered and rejected. Voelkel v. GMC, 846 F.Supp. 1482, 1483 (D.Kan.1994). Indeed, "[a] party's failure to present his strongest case in the first instance does not entitle him to a second chance in the form of a motion to amend." Paramount Pictures Corp. v. Video Broadcasting Sys., Inc., No. 89-1412-C, 1989 WL 159369, at *1 (D.Kan. Dec. 15, 1989) (citing

United States v. Carolina Eastern Chem. Co., Inc., 639 F.Supp. 1420, 1423 (D.S.C.1986)). Such motions are therefore not appropriate if the movant intends only that the court hear new arguments or supporting facts. Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir.1991).

III. DISCUSSION

A. Eleventh Amendment Immunity

The defendant raises four issues in the motion for reconsideration. The first basis is that the case should be dismissed for lack of jurisdiction based upon the case of Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). The defendant claims that Seminole Tribe, along with Ellis v. University of Kansas Medical Center, 163 F.3d 1186 (1998) and Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), requires the dismissal of this case based on Eleventh Amendment immunity. The court previously addressed the application of Seminole Tribe to this case and found that it did not provide a bar to the plaintiffs' claims. Sac & Fox Nation of Missouri v. Lafaver 979 F.Supp. 1350 (1997). To the extent Ellis relies upon Seminole Tribe, the court finds that it is similarly inapplicable.

The defendant's reliance on Coeur d'Alene is similarly misplaced. In Coeur d'Alene, the Court held that a federal court cannot grant prospective relief under the Ex parte Young doctrine when that relief implicates special sovereignty interests that results in an intrusion functionally equivalent to an award of money damages. Ellis, 163 F.3d at 1198. The issues in this case do not "implicate special sovereignty issues" as is required by Coeur d'Alene.

The court has previously ruled that this case is not barred by the Eleventh Amendment. The defendant has not produced any new legal or factual contentions which *862 would cause the court to come to a different conclusion today. The motion for reconsideration is denied as it relates to the issue of Eleventh Amendment immunity.

B. Standing

The defendant next claims that the plaintiffs do not have standing in this case. On page 12 of the motion for reconsideration, the defendant states:

In its December 17, 1998 Memorandum and Order, the court correctly determined that the Motor Fuel Tax Act clearly places the legal incidence of the tax on distributors, not on retailers such as plaintiffs. However, legal incidence and standing are two sides of the same coin and this case should be analyzed form that perspective.

The defendant's theory is that if the legal incidence of the tax does not fall on the tribes, they cannot have standing to bring suit. The court disagrees. The Court in Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), set out a two-prong test for determining whether taxes impacting Indian tribes are proper. The first prong of the test is to determine where the legal incidence of the tax falls. If the legal incidence of the tax is on the tribes, then the tax is invalid. If not, the courts are to move on to the second prong of the test and balance the state's interest in assessing the tax with the federal and tribal interest in barring the tax. The defendant's analysis would make this two-prong test a nullity. Under the defendant's theory, the

first prong would always be dispositive of the case. If the court found that the tribes lacked standing every time the legal incidence of the tax fell on the distributor instead of the tribe, the balancing test would never come into play.

The court has previously decided that the plaintiffs do have standing to bring this case. The defendant is simply rehashing the prior arguments brought before this court. The motion for reconsideration is denied as it relates to the standing issue.

C. The Interpretation of the Organic Act and Act for Admission to the Union

The defendant has not produced any new legal or factual issues in regard to its motion to reconsider on this issue. All of the defendant's arguments were previously considered and are no basis to overturn this court's prior ruling. The defendant has asked the court to withdraw its decision on this issue as it is not necessary for the determination of the case. The court declines to do so. In the alternative, the defendant has asked the court to certify the question of whether the reservations should be considered within the state of Kansas to the Kansas Supreme Court for a ruling. The court finds that this is unnecessary and denies that request.

D. The Balancing of State, Tribal and Federal Interests

The defendant's final basis for the defendant's motion to reconsider concerns the court's analysis of the balancing of state, federal and tribal interests. Under the Chickasaw Nation two-prong test, the court is to balance these competing interest in determining whether to uphold a tax where the legal incidence of the tax does not fall on the Indian tribes. The court found then, as it does now, that there was sufficient

evidence before the court to make a ruling on this balancing issue.

The defendant claims that according to the Report of the Parties' Planning Meeting, filed with the court on February 19, 1997, the parties agreed that if the court determined that the legal incidence of the tax did not fall on the plaintiffs, then discovery would be necessary to bring forth facts for the court to balance tribal and state interests. The defendant did not raise this issue in any of the briefs filed in support of its motion for summary judgment or in response to the plaintiffs' motion. The defendant discusses this issue in its response to the plaintiff's motion for *863 summary judgment without once indicating that further discovery was needed. To rule that the issue was not ready for ruling would allow the defendant to take two bites at the apple. The defendant argued its case about the balancing of interests and the court ruled against the defendant. The defendant now wants to have another shot at this issue. Because the defendant argued this issue in its response to the plaintiffs' motion for summary judgment without raising the issue of the parties agreeing to conduct further discovery, the court finds that the defendant has waived any right to rely on the parties' agreement and denies the motion for reconsideration on this issue.

IV. CONCLUSION

The defendant has not produced any additional legal arguments or factual contentions that would cause the court to reverse its earlier decision to grant the plaintiffs' motion for summary judgment and deny the defendant's motion for summary judgment. The court finds that each of the four areas the defendant claims were in error were properly decided and took into account all of the necessary facts.

IT IS THEREFORE BY THIS COURT ORDERED that the defendant's Motion for Reconsideration (Doc. 103) is denied. D.Kan., 1999.

Decision of the District Court, Dated Dec. 17, 1998.

Sac and Fox Nation of Missouri v. Lafaver
cite as 31 F.Supp.2d 1298

Sac and Fox Nation of Missouri; Iowa Tribe of Kansas and Nebraska; Kickapoo Tribe of Indians, of the Kickapoo Reservation in Kansas, Plaintiffs, v. John D. Lafaver, Secretary, Kansas Department of Revenue, Defendant.

No. Civ.A. 95-4152-DES

United States District Court, D. Kansas.

Dec. 17, 1998.

Mark S. Gunnison, Stephen D. McGiffert, Payne & Jones, Chtd., Overland Park, KS, John R Shordike, Patricia Prochaska, Berkeley, CA, Paul Alexander, Alexander & Karshmer, Washington, DC, for Sac and Fox Nation of Missouri, Iowa Tribe of Kansas & Nebraska, plaintiffs.

Pedro L. Irigonegaray, Robert V. Eye, Irigonegaray & Associates, Topeka, KS, Mario Gonzalez, Horton, KS, for Kickapoo Tribe of Indians, plaintiff.

Amy Weller Liebau, Hinkle, Eberhart & Elkouri, L.L.C., Wichita, KS, John Michael Hale, Jason L. Reed, Kansas Department of Revenue, Bureau of Legal Services, Topeka, KS, for John D. Lafaver, defendant.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on defendant's Motion for Summary Judgment (Doc. 93) and plaintiffs' Motion for Summary Judgment (Doc. 94).

I. BACKGROUND

The basic facts in this case are not in dispute. The plaintiffs are three federally-recognized Indian Tribes: the Sac and Fox Nation of Missouri ("Sac and Fox"); the Iowa Tribe of Kansas and Nebraska ("Iowa"); and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas ("Kickapoo") (collectively the "Tribes"). Sac and Fox is the beneficial owner of and exercises jurisdiction over the Sac and Fox Indian Reservation, as well as land located at Reserve, Kansas, which land is held in trust for Sac and Fox by the United States of America. Iowa is the beneficial owner of and exercises jurisdiction over the Iowa Tribe of Kansas and Nebraska Indian Reservation. A part of the Iowa land is held in trust for Iowa by the United States of America. Kickapoo is the beneficial owner of and exercises jurisdiction over land within the Kickapoo Nation's federally recognized boundaries, which land is held in trust for Kickapoo by the United States of America. All three plaintiffs operate retail gasoline stations on their reservations, and assess tribal taxes on their motor-vehicle fuel sales.

On May 7, 1995, the Kansas Legislature passed Senate Bill 88 ("SB 88"), which is codified at Kan. Stat. Ann. 79-3408g(d)(2). [FN1] Section 79-3408g(d)(2) provides as follows:

> FN1. Senate Bill 421, which was passed by the Kansas Legislature in 1998, repealed Kan. Stat. Ann. 79-3408g. However, as this statute was applicable during a portion of the time relevant to this case, it will still be discussed.

> No tax is hereby imposed upon or with respect to the following transactions: ... (2) The sale or delivery of

> motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation, except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a nonmember of such reservation.

On May 17, 1995, the legislature passed House Bill 2161 ("HB 2161"), which is codified at Kan. Stat. Ann. 79-3408(d)(2). Section 79-3408(d)(2) contains the exemption language of section 79-3408g(d)(2), but does not contain the exception for deliveries to nonmembers of Indian reservations. Section 79-3408(d)(2) reads as follows: "No tax is hereby imposed upon or with respect to the following transactions: ... (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation."

On September 6, 1995, the Kansas Department of Revenue ("DOR") announced its intention to begin collecting tax on motor-vehicle fuel sales from distributors to plaintiffs. Plaintiffs challenged the imposition of this tax and alleged that the Kansas statutes purporting to subject the Tribes to the state's motor-vehicle fuel tax are unconstitutional and preempted by federal law. On October 5, 1995, this court entered a temporary restraining order enjoining and restraining DOR from applying and enforcing the collection of any motor-vehicle fuel tax on tribal retail motor-vehicle fuel sales on Indian lands, including sales from distributors to plaintiffs, as outlined in Senate Bill No. 88, signed on May 7, 1995, and House Bill No. 2161, signed on May 17, 1995, and

implemented on September 6, 1995. The court further ordered that the temporary restraining order would be effective until such time as the court had ruled on plaintiffs' motion for preliminary injunction. The court ordered a preliminary injunction on October 30, 1996.

II. SUMMARY JUDGEMENT STANDARD

A court shall render summary judgment upon a showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The substantive law identifies which facts are material. Id. at 248, 106 S.Ct. 2505. A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. Id. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

The movant has the initial burden of showing the absence of a genuine issue of material fact. Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 (10th Cir.1993). The movant may discharge its burden "by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The movant need not negate the nonmovant's claim. Id. at 323, 106 S.Ct. 2548.

Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324, 106 S.Ct. 2548 (interpreting Fed.R.Civ.P. 56(e)). Rule 56(c) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. Id. at 322, 106 S.Ct. 2548. Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. Id. at 323, 106 S.Ct. 2548.

A court must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence. See, e.g., U.S. v. O'Block, 788 F.2d 1433, 1435 (10th Cir.1986) (stating that "[t]he court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues"). The court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. Anderson, 477 U.S. at 249, 106 S.Ct.2505. Essentially, the court performs the threshold inquiry of determining whether a trial is necessary. Id. at 250, 106 S.Ct. 2505.

III. ANALYSIS

A. Standing

Under the United States Constitution, federal courts only have jurisdiction to hear a matter if there is a "case or controversy." U.S. Const. Art. III, 2. One element of the case or controversy requirement is that the plaintiff must establish that they have standing to sue. Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 2317, 138 L.Ed.2d 849 (1997). The standing inquiry focuses on whether the plaintiffs are the proper parties to bring this suit. Id. In order to meet the standing requirements of Article III, " '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " Id. (quoting Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)).

The defendant claims that the plaintiffs cannot meet the threshold requirement of standing to maintain this suit. In support of this contention, the defendant states that the distributors of the motor-vehicle fuel are the proper party because they are responsible for the payment of the taxes to the state.

Standing contains three requirements. First, there must be an "injury in fact" – a harm suffered by the plaintiffs that is "concrete" and "actual or imminent." The second requirement is causation – a traceable connection between the plaintiffs' injuries and the defendant's actions. Finally, there must be redressability, – or a likelihood that the requested relief will redress the alleged injury. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 1016-17, 140 L.Ed.2d 210 (1998).

The court finds that the plaintiffs in this action meet the

constitutional requirements for standing. The court has no doubt that the tax in question will be passed along to the tribal retailers if it is paid by the distributors. As discussed below, this is specifically allowed by the laws in question. The plaintiffs would then be left with two choices. First, the tribe could pass the tax along to the consumer, which would raise the price of fuel and undoubtedly lower sales. The other option would be to absorb the tax themselves in an effort to keep sales up. In either case, the plaintiffs would suffer a real economic loss if the tax is charged to the distributor. This satisfies the first requirement of "injury in fact." There is no causation concern in this case. Clearly it is the tax in question that would cause the plaintiffs' injuries. Finally, the court finds that by granting a permanent injunction and finding the tax in question unenforceable, the court can adequately redress the plaintiffs' injuries. Having met the three requisite showings for standing, the court finds that this case is properly brought by the plaintiffs and should proceed on its merits.

B. Tax Compacts

The plaintiffs claim that the tax in question is barred by tax compacts entered into by the respective tribes and the state of Kansas. In 1991 and 1992, the respective tribal counsel, the governor of the state of Kansas, and the secretary of the Kansas Department of Revenue entered into these compacts. According to the terms of the compacts, the state agreed not to tax certain transactions which involved the tribes, provided that the tribes placed a tax on the consumers. The plaintiffs allege that these compacts prohibit the state from taxing the fuel purchased by the tribes for resale. The defendant claims that, because these compacts were never approved or ratified by the Kansas Legislature, they have no legal effect.

As an initial note, these compacts, by their own language, were effective only until 1996, if at all. No compacts have been entered into by the tribes and the state since 1996. Therefore, this argument only pertains to the portion of the taxes in question which relate to dates prior to 1996.

The leading case in Kansas concerning the governor's ability to bind the state under a compact is State ex rel. Stephan v. *1303 Finney, 251 Kan. 559, 836 P.2d 1169 (1992). In Finney, the Kansas Supreme Court invalidated gaming compacts entered into by then Governor Finney and certain Indian tribes located in Kansas. The court held that the compacts in question would have created substantive changes in the state's government by creating a new agency and substantively changing the state law. This, held the court, was the function of the state legislature, not the governor.

The plaintiffs claim that the Finney case is not controlling because it is distinguishable. One of the major concerns the Kansas Supreme Court had with the compacts at issue in Finney was that the compacts would create a new set of duties and responsibilities on a state agency. Clearly the Finney case is distinguishable on this point. The compacts in this case would have no impact on the duties or functions of any existing state agency and would not have the effect of creating a new state agency. Therefore, the court's holding that creating such additional duties on a state agency is beyond the authority of the governor does not provide any guidance when the governor does not undertake such a task, as is the case presently before the court. Another problem discussed by the court in Finney was that the compacts would have made substantive changes to the state laws. While the plaintiffs claim that the compacts in this case would not alter state law, the court disagrees.

Although the current compacts would not have created any new government agencies in the state of Kansas, the compacts would have made a substantive change to state law. If the compacts were to be applied as is requested by the plaintiffs in this case, the compacts would have created an exemption to the existing state tax laws. The creation of tax exemptions is function for the state legislature, not the governor. The legislature clearly considered whether certain transactions involving motor-vehicle fuel should be given a tax exemption, as evidenced by the fact that many are included in the tax statutes. To allow the governor to create new tax exemptions without the approval of the state legislature would be a violation of the Kansas Constitution. As the Kansas Supreme Court held in Finney, this court holds that although the governor of Kansas had the authority to negotiate the compacts in question with the Indian tribes, only the legislature has the authority to make those compacts binding. Therefore, the tax compacts at issue in this case are of no legal effect.

C. Statutory Exemptions

The plaintiffs discuss at length in their briefs that the statutes, upon which the state of Kansas is relying upon to collect the tax, exempt transactions involving Indian tribes. According to the plaintiffs, the two different provisions of Kan. Stat. Ann. 79-3408 justify an exemption to transactions involving Indian tribes. First, the plaintiffs claim that the provision found in subsection (d)(2) of 79-3408 allows such an exemption. According to the plaintiffs, subsection (d)(2) should be read as it appears in 79-3408 and not as it appears in 79-3408g. The court agrees.

This issue has become extremely confusing because the Kansas Statutes contain two versions of the same statute. Section 79-3408 was amended twice in 1995. Rather than containing only the controlling version of the statute, which the court finds is clearly the version created by House Bill 2161 as it was the latter bill to be passed into law, the bound volume of the Kansas Statutes Annotated contains both versions. The controlling version of the statute provides an exemption from the fuel tax laws on any transactions involving "[t]he sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation." Kan. Stat. Ann. 79-3408(d)(2) (1997) What is not contained in this version is the following language, "except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a nonmember of such reservation." Kan. Stat. Ann. 79-3408g(d)(2) (1997).

The court finds that this language is immaterial to the plaintiffs' case. The exemption at issue in 79-3408(d)(2) applies to the United States of America and its agencies. The court is unaware of any legal authority which indicates that federally recognized Indian tribes are agencies of the United States. Plaintiffs have indicated that it was this exemption that was relied upon by the state of Kansas to exempt transactions involving tribal retailers in the past. However, the fact that the state of Kansas had erroneously interpreted the statute to provide an exemption in the past is not sufficient to require them to do so now. Kan. Stat. Ann. 79-3408(d)(2) does not exempt from the motor-vehicle fuel tax those transactions involving retailers located on Indian reservations.

The plaintiffs also claim that Kan.Stat.Ann. 79-3408(d)(1) provides an exemption to the motor-vehicle fuel taxes in transactions involving tribal retailers. The section states that no tax is imposed upon transactions involving "[t]he sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country." Kan. Stat. Ann. 79-3408(d)(1) (1997).

The question which has been debated at length by both parties is whether the Indian reservations located within the borders of the state of Kansas should be considered another "state or territory" as is provided for in 79- 3408(d)(1). The plaintiffs base their argument in the Act for Admission of Kansas Into the Union and the Organic Act. Both of these acts make it very clear to the court that the Indian reservations are not to be considered part of the state of Kansas in any way. The plain language of both acts states that "all such territory shall be excepted out of the boundaries, and constitute no part of the territory [state] of Kansas."

The defendant claims that the language contained in 79-3408(d)(1) was not meant to exclude transactions involving Indian tribes. The statute exempts any fuel transactions where the fuel is exported "to any other state or territory or to any foreign country." From this reading, the court can only conclude that the intent of the Kansas Legislature was to exempt any transaction where fuel was to be sold outside the boundaries of the state of Kansas. As the Act for Admission of Kansas into the Union and the Organic Act both clearly exclude the Indian reservations from the boundaries of the state of Kansas, it is only reasonable that 79-3408(d)(1) provides for an exemption to the transactions involved in this case where fuel is sold to tribal retailers on the recognized reservations.

Based on this ruling, the court finds that the plaintiff's request for a permanent injunction prohibiting the state of Kansas from taxing any and all transactions involving the sale of motor-vehicle fuel to retailers located on reservations must be granted. Although the court finds that the injunction should be granted based upon the exemptions contained in the Kansas statutes, the court will also discuss whether federal law permits the application of the tax, as well.

D. Legal Incidence of the Tax

The first step in determining whether federal law prohibits Kansas from imposing the tax in question is to determine where the legal incidence of the tax falls. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995). If the legal incidence of the tax falls on the tribal retailers, the state will be prohibited from assessing the taxes. Id. at 459, 115 S.Ct. 2214. However, if the legal incidence of a tax falls on non-tribal members, then there is no categorical bar to the tax. Id.

In Chickasaw Nation, the Court found that the legal incidence of the fuel tax in question fell on the tribes, and thus held that Oklahoma could not enforce the tax. The defendant argues that the tax in question in this case is substantially different from that imposed in the Chickasaw Nation case and that the legal incidence of the tax is on the distributors of motor-vehicle fuels, not on the tribal retailers. The plaintiff contends that, although the two tax statutes are different in some ways, certain key elements remain in the Kansas tax which have the effect of placing the legal incidence of the tax on the tribes. The court agrees with the defendant and holds that the tax in question is legally imposed on the distributors, not on the

retailers.

1. Status Prior to 1998 Amendments

In order to determine who the legal incidence of the tax is imposed upon, the court *1305 will compare some of the key provisions discussed by both the United States Supreme Court and the Tenth Circuit Court of Appeals in reaching their determination that Oklahoma's tax was legally imposed on the tribes with the Kansas law in question. In Chickasaw Nation, the Oklahoma tax concerned motor-vehicle fuel taxes "remitted by a distributor on behalf of a licensed retailer." Chickasaw Nation v. State of Oklahoma, 31 F.3d 964, 971 (1994) (emphasis added). The Kansas law contains no provision which states that the distributor is remitting the tax "on behalf of a licensed retailer." In Chickasaw Nation, the Tenth Circuit also notes that the distributor is allowed a credit for any taxes that are uncollectible from the retailer. Id. Although the Kansas law does allow distributors to deduct a 2.5 percent allowance from the amount of motor-vehicle fuel subject to taxes, it is apparent from the statute that this allowance is for losses incurred in actually handling the fuel, such as spillage, and not losses as a result of not collecting taxes from retailers as was the case in Chickasaw Nation.

The tribes argue that the provision in the Kansas legislation which allows distributors to pass the amount of the tax along to the tribes as part of the purchase price has the effect of imposing the legal incidence of the tax on the retailers. Initially, the court wishes to point out that this provision is not mandatory on the distributors. No distributor is required to pass the amount of tax along to the retailer. The fact that the language appears unnecessary due to the fact that the distributors would be able to pass the cost along to retailers

even without the statutory authorization in no way affects the plain language of the statute. Distributors have the option of passing the tax along if they wish, but are in no way required to do so by the statute. Contrary to plaintiff's claims, this provision cannot reasonably be read to require distributors to "collect and remit" the taxes in question on behalf of the retailer.

The fact that the amount of the tax may ultimately be funneled down to the tribal retailers has no effect on the legal incidence of the tax. In the Tenth Circuit's opinion in Chickasaw Nation, the legal incidence of the tax did not fall on the tribal retailer because the amount of the tax would ultimately be passed along to the consumer. In response to this argument, the court stated:

While it may well be that the tax is ultimately passed on to the consumer at the pump, the question is whether the statutes in question legally impose the taxes on the Tribe. The question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed. Id. at 972.

Plaintiffs claim that several other provisions of the Kansas tax statutes impose the legal incidence of the taxes on the retailer. Plaintiffs claim that the provision of Kan. Stat. Ann. 79-3408(a) which states that the tax is imposed on all fuel which is "used, sold, or delivered in this state for any purpose whatsoever" is similar to a provision in the Oklahoma tax which was relied upon by the Court to invalidate the Oklahoma tax. The court disagrees. The discussion about the similar provision in the Oklahoma tax by the Court in Chickasaw Nation was centered around the issue of whether the retailer could be considered a mere collection agent for the consumer just as the distributor was a collection agent for the

retailer. That analysis is irrelevant here because the court has already determined that, under the Kansas law, the distributor is not acting as a collection agent of the retailer, thus making a determination of whether the retailer was, in turn, simply a collection agent for the consumer unnecessary.

Another provision of the Kansas law which Plaintiff claims is an indication that the legal incidence of the tax falls on the Tribal retailers is the exemption from taxes on sales between distributors, Kan. Stat. Ann. 79-3408(d)(5). In Chickasaw Nation, the Court construed a similar provision of the Oklahoma tax to indicate that the legal incidence fell on the retailer not the distributor. However, after reading 79-3408 as a whole, the court comes to a different conclusion in regard to the Kansas exemption. Section 79-3408(c) states "[s]uch tax shall be paid but once." If sales between distributors were not given an exemption from the fuel tax, each transfer of the fuel between distributors would result in a tax assessment for the amount of fuel transferred. This would clearly lead to multiple taxes on the same fuel as it is passed from distributor to distributor and eventually to a retailer. The court finds that the provision of the Kansas tax which exempts sales between distributors serves the purpose of preventing multiple taxation, and not imposing the legal incidence of the tax on the retailer.

The plaintiffs further point to several provisions of the Kansas Session Laws which they claim places the legal incidence of the tax on the retailer. For example, in Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, the plaintiffs quote the following passage from the Kansas Session Laws:

It shall be unlawful for any ... retailer to: (3) fail, neglect or refuse to pay the director within the time required by the act,

any tax, taxes, interest or penalties for which such person is liable under the provisions of this act. 1995 Kan. Sess. Laws Ch. 262, 11.

The eliminated portion of this bill states that it applies to any "distributor, importer, exporter, manufacturer, retailer, user, carrier, transporter or any other person." Id. The full text of the section also lists seventeen other actions which are made illegal by the bill. Clearly, some of these eighteen illegal acts pertain to only certain groups enumerated in the bill. The language of subsection (3), on which the plaintiffs rely, does not, in any way, impose a tax liability on the retailer. The section states that it is unlawful for any person to "fail, neglect or refuse to pay the director, within the time required by this act, any tax, taxes, interest or penalties for which such person is liable under the provisions of this act." Id. (Emphasis added). This provision does not create or impose any tax liability on any person or entity. Rather, it makes it a criminal offense not to pay taxes that are required under the act. Therefore, unless some other provision in the act places a direct tax burden on the retailer, this section does not apply to retailers.

The next section of the Kansas law which the plaintiffs claim imposes the fuel tax on the retailer is quoted by the plaintiffs as follows:

If any ... retailer ... shall fail, neglect, or refuse to render any report required by the provisions of this act within the period specified, or if the director is not satisfied of the correctness of any report or tax payment made by any ... retailer ... the director is hereby authorized and empowered to determine ... the true amount of taxes, penalties, and interest due the state from such ... retailer.... Promptly after making such

determination the director shall send ... a statement to such ... retailer and shall proceed to collect the amount so determined. 1995 Kan. Sess. Laws Ch. 262, 33.

When read in context, this provision does not impose any tax liability on the retailers. The section applies to any "distributor, manufacturer, importer, exporter or retailer." Id. This provision does not impose a tax liability on anyone. It simply gives the director the ability to use any information in the director's possession to determine the correct amount of tax that is owing on the sale of motor-vehicle fuels when an improper amount has been paid. Because no other provision in the act requires the retailer to pay these taxes, the portion pertaining to taxes in this section of the bill does not apply to retailers. However, retailers are required to file reports on the amount of fuel received, thus explaining the inclusion of retailers in this section.

Plaintiffs quote a third section of the Kansas Session Laws which, they claim, imposes the Kansas fuel taxes on the retailer. This section is quoted by the plaintiffs as follows:

Whenever any ... retailer ... is 10 days delinquent in the making of any such report or the payment of any such tax, penalty, or interest ... the director upon conducting a hearing as provided in this section and upon finding to the director's satisfaction upon such hearing, that such retailer ... has been delinquent, or has violated provisions of this act, may revoke any or all licenses issued to such ... retailer. 1995 Kan. Sess. Laws Ch. 262, 29.

As with the other sections of this bill cited by the plaintiffs, the court finds that, despite the *1307 plaintiffs' artful method of selectively quoting the law so as to take the quote

completely out of context, this section does not impose the tax in question on retailers. The section states that when any "distributor, manufacturer, importer, exporter or retailer" fails to either pay taxes that are required to be paid, or to file required reports, the director can repeal their licenses. It does not require anyone to pay taxes. Instead, it gives the director power to enforce the tax scheme. As has been stated above, and clearly provided in the Kansas laws, the retailers are required to make reports concerning the amount of fuel they receive, but not to pay or remit any taxes. Therefore, this section of the law is only applicable to retailers insomuch as it relates to the failure to make the required reports. It clearly does not impose the legal incidence of any taxes on the retailer.

2. After 1998 Amendments

In 1998, the Kansas Legislature amended the Kansas tax laws in an effort to clarify where the legal incidence of the motor-vehicle fuel tax fell. These amendments remove most of the language concerning retailers complained of by the plaintiffs in the above section. In addition, the new version of Kan. Stat. Ann. 79-3408 states:

Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel.... 1997 Kan. Sess. Laws Ch. 421, 2.

The court has found nothing in the Kansas tax laws, either prior to or after the 1998 amendments, which places the legal incidence of this tax on the retailer. Rather, the statutes are extremely clear in providing that the tax in question is imposed upon the distributor. This, however, does not end the analysis of whether the tax in question should be upheld.

Even if the legal incidence of the tax does not fall on the tribal retailers, the court can still invalidate the tax upon a finding that federal and tribal interests in not having the tax enforced outweighs the interests of the state of Kansas in collecting such taxes. See Chickasaw Nation, 515 U.S. at 459, 115 S.Ct. 2214 (holding that a balancing test is used to determine the validity of the tax when the legal incidence of the tax does not fall on the tribe).

F. Balancing of Federal, Tribal and State Interests

The first step in analyzing the balancing test is determining what impact would be sustained by the state of Kansas if the tax in question is invalidated. As an initial point, the court wishes to stress that Kansas has never in the past taxed motor-vehicle fuel transactions involving the Indian tribes. A ruling invalidating the tax would not take money out of the state coffers that had been relied upon in the past. Instead, it would only result in a prohibition on collecting new taxes. In addition, although no evidence is currently before the court concerning what percentage of motor-vehicle fuel sales involve tribal retailers, it is obvious to the court that such transactions make up a very small part of the transactions which would fall under the taxing statute. Invalidating the tax as it applies to transactions involving tribal retailers would not undermine the taxing scheme set up by the tax laws. The state of Kansas would clearly not suffer a great deal of harm if it were enjoined from collecting the tax in question.

The second step in the balancing test would be to determine the impact of the tax on the tribal retailers. It is clear to the court that the each of the plaintiffs in this case rely heavily on the sale of motor-vehicle fuel on their reservations for income. The court has no doubt that the distributors who provide the

fuel to the tribal retailers will pass the price of the tax on as a portion of the price. In fact, this practice is specifically authorized in the legislation. See, Kan. Stat. Ann. 79-3409 (1997). This will leave the tribal retailers with two options: continue to sell the motor-vehicle fuel at the same cost and absorb the cost of the tax that is passed on to them, or pass the tax on to the consumer by increasing prices, which will in all likelihood reduce sales. In either case, the tax will have a real and direct impact on the tribes' income. The court finds that the balancing test discussed in Chickasaw Nation shows that the tax must be invalidated. The impact the loss of revenue would have on *1308 tribal functions would be much greater than the impact on the state of Kansas. Tribal autonomy is an important concern not only for the tribes, but for the federal government as well. Without sufficient revenue, tribal autonomy would clearly be compromised. For this reason, the court finds that the tax in question must be invalidated as it relates to transactions involving tribal retailers.

IV. CONCLUSION

Having examined the motions and briefs filed in this case, the court makes the following findings and conclusions. The court finds that the plaintiffs have met the constitutional requirement of standing to bring this lawsuit. The court also finds that the tax compacts entered into between the governor of the state of Kansas and the plaintiffs are of no legal effect. However, Kan. Stat. Ann. 79-3408(d)(1) provides an exemption from taxation for transactions where motor-vehicle fuel is sold to retailers located on Indian reservations.

As a separate basis for granting the injunction, the court finds that although the legal incidence of the tax in question falls upon the distributors of the motor-vehicle fuel, and not on the

tribal retailers, the interests of the plaintiffs in not having the taxes collected far outweighs the interests of the state of Kansas in collecting the tax on transactions involving Indian tribes.

IT IS THEREFORE BY THIS COURT DECLARED that Kan. Stat. Ann. 79-3408 is invalid insomuch as it applies to the collection of taxes on any and all transactions involving the sale of motor-vehicle fuels to all federally recognized Indian tribes which in turn sell the fuel as a retailer on reservations and trust land located within the state of Kansas.

IT IS THEREFORE BY THIS COURT ORDERED that plaintiffs' Motion for Summary Judgment (Doc. 94) is granted and defendant's Motion for Summary Judgment (Doc. 93) is denied.

IT IS FURTHER ORDERED that the State of Kansas is permanently enjoined from enforcing Kan. Stat. Ann. 79-3408 and collecting taxes from distributors on the sale of motor-vehicle fuel in all transactions involving the federally recognized Indian tribes who are plaintiffs to this action.

D. Kan.,1998.

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Supreme Court, U.S.
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No. _____

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation, *Petitioners*

v.

Karla Pierce, Secretary, Kansas Department of Revenue, *Respondent*

On Petition For A Writ Of Certiorari
to the United States Court of Appeals for the Tenth Circuit

APPENDIX, VOL. II FOR A WRIT OF CERTIORARI

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APPENDIX II

TABLE OF AUTHORITIES

U.S. CONSTITUTION PROVISIONS:

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Act for Admission of Kansas Into the Union, 12 Stat 126, *(Kansas Enabling Act)*..... 1

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U.S. CONSTITUTION PROVISIONS:

U.S. CONSTITUTION, AMD. V

Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUES:

AN ACT FOR THE ADMISSION OF KANSAS INTO THE UNION, Act of Jan. 29, 1861, ch. 59, s. 1, 12 Stat. 126.

Section 1. Admission; boundaries; Indian title. That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the union on an equal footing with the original states in all respects whatever. And the said state shall consist of all the territory included within the boundaries, to wit: Beginning at the point on the western boundary of the state of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the twenty-fifth meridian of longitude west from Washington; thence north on said meridian to the fortieth parallel of latitude; thence east on said parallel to the

western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning: *Provided:* That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed.

AN ACT TO ORGANIZE THE TERRITORY OF KANSAS, Act of May 30, 1854, ch. 59, s.19, 10 Stat. 284.

Section 19. Creation of territorial government. That all that part of the territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit, beginning at a point on the western boundary of the state of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the eastern boundary of New Mexico; thence north on said boundary to latitude thirty-eight; thence following said

boundary westward to the east boundary of the territory of Utah, on the summit of the Rocky Mountains; thence northward on said summit to the fortieth parallel of latitude; thence east on said parallel to the western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the territory of Kansas; and when admitted as a state or states, the said territory, or any portion of the same shall be received into the union with or without slavery, as their constitution may prescribe at the time of their admission: *Provided further:* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with an Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Kansas, until said tribe shall signify their assent to the president of the United States to be included within the said territory of Kansas, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

THE KANSAS ACT, 18 U.S.C. 3243

Jurisdiction is conferred on the State of Kansas over offenses

committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

KANSAS STATUTE ANNOTATATED 79-3408

79-3408. Tax imposed on use, sale or delivery of motor-vehicle fuels or special fuels; pumps lab
(a) A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.
(b) Every retail pump for motor-vehicle fuels shall be conspicuously labeled to show the content and percentage of any ethyl alcohol or other alcohol combined or alone in excess of 1% by volume.
(c) Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein, except that an allowance of 2.5% shall be made and deducted by the distributor to cover all ordinary losses which may have resulted from physical loss while handling such motor-vehicle fuels or special fuels. No such allowance shall be made on any motor-vehicle fuel or special fuel exported from the state or sold to the United

States of America or any of its agencies or instrumentalities as are now or hereinafter exempt by law from liability to state taxation. No such allowance shall be made for any motor-vehicle fuel or special fuel sold or disposed of to a consumer in tank car, transport or pipeline lots.

(d) No tax is hereby imposed upon or with respect to the following transactions:

(1) The sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.

(2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation.

(3) The sale or delivery of motor-vehicle fuel or special fuel to a contractor for use in performing work for the United States or those agencies of the United States above mentioned, provided such contractor has in effect with the United States or any such agency a cost-plus-a-fixed-fee contract covering the work.

(4) The sale or delivery of motor-vehicle fuel or special fuel which is aviation fuel.

(5) The first sale or delivery of motor-vehicle fuel or special fuel from a refinery, pipeline terminal, pipeline tank farm or other place to a duly licensed distributor who in turn resells to another duly licensed distributor.

(6) The sale or delivery of special fuel which is indelibly dyed in accordance with regulations prescribed pursuant to 26 U.S.C. 4082 and such special fuel is only used for nonhighway purposes.

(e) Each distributor, manufacturer, importer, exporter or retailer shall make full reports and furnish such further information as the director may require with reference to all

transactions upon which no tax is to be paid.

TREATIES:

TREATY WITH THE KICKAPOO, Oct. 24, 1832, art. 2, 7 Stat. 391.

ARTICLE II. The United States will provide for the Kickapoo tribe, a country to reside in, southwest of the Missouri river, as their permanent place of residence as long as they remain a tribe. And whereas, the said Kickapoo tribe are now willing to remove on the following conditions, from the country ceded on Osage river, in the State of Missouri, to the country selected on the Missouri river, north of lands whcih have been assigned to the Delawares; it is hereby agreed that the country within the following boundaries shall be assigned, conveyed, and secured by the United States to the said Kickapoo tribe, as their permanent residence, viz: Beginning on the Delaware line, six miles westwardly of Fort Leavenworth, thence with the Delaware line westwardly sixty miles, thence north twenty miles, thence in a direct line to the west bank of the Missouri, at a point twenty-six miles north of Fort Leavenworth, thence down the west bank of the Missouri river, to a point six miles nearly northwest of Fort Leavenworth, and thence to the beginning.

TREATY WITH THE KICKAPOO, May 18, 1854, art. 1, 10 Stat. 1078.

ARTICLE 1. The Kickapoo tribe of Indians hereby cede, sell,

and convey unto the United States all that country southwest of the Missouri River, which was provided as a permanent home, for them in the treaty of Castor Hill, of the twenty-fourth of October, one thousand eight hundred and thirty-two, and described in the supplemental article thereto, entered into at Fort Leavenworth, on the 26th of November, one thousand eight hundred and thirty-two, as follows: Beginning "on the Delaware line, where said line crosses the left branch of Salt Creek, thence down said creek to the Missouri River, thence up the Missouri River thirty miles when measured on a straight line, thence westwardly to a point twenty miles from the Delaware line, so as to include in the lands assigned to the Kickapoos, at least twelve hundred square miles;" saving and reserving, in the western part thereof, one hundred and fifty thousand acres for a future and permanent home, which shall be set off for, and assigned to, them by metes and bounds. *Provided,* That upon the return home of the delegates here contracting, and upon consultation with their people, and after an exploration if required by them, in company with their agent, a location to that extent can be found within said specified section of country suited to their wants and wishes. *And it is further provided,* That should a suitable location, upon examination and consultation, to the full extent of one hundred and fifty thousand acres, not be found within said western part of this cession, then the said delegates and agents shall be permitted to extend the location beyond the western line of the country herein ceded and north of the recent Delaware line over so much of the public domain, otherwise unappropriated, as shall make up the deficiency - or to make a selection entirely beyond the limits of the country at present occupied by the Kickapoos upon any lands of the United States, not otherwise appropriated, lying within the limits of

the country at present occupied by the Kickapoos upon any lands of the United States, not otherwise appropriated, lying within the limits bounded by the said western line, by the recent Delaware northern line, and the waters of the Great Nemahaw River; and in either case they shall describe their selection, which must be made within six months from date hereof, by metes and bounds, and transmit the description thereof, signed by the said delegates and agent, to the Commissioner of Indian Affairs; and thereupon, the selection so made, shall be taken and deemed as the future permanent home of the Kickapoos shall claim under this article no more than one hundred and fifty thousand acres of land; and if that quantity or any portion thereof shall be selected, as provided above, outside of the reservation herein made, then said reservation, or a quantity equal to that which may be selected outside thereof, shall be, and the same is hereby, ceded and relinquished to the United States.

TREATY WITH THE IOWA, Sept. 17, 1836, art. 2, 7 Stat. 511.

ARTICLE 2. As the said tribes of Ioways and Sacks and Foxes, have applied for a small piece of land, south of Missouri, for a permanent home, on which they can settle, and request the assistance of the Government of the United States to place them on this land, in a situation at least equal to that they now enjoy on the land ceded to them: Therefore I, William Clark, Superintendent of Indian Affairs, do further agree on behalf of the United States, to assign to the Ioway tribe, and Missouri band of Sacks and Foxes, the small strip of land on the south side of the Missouri river, lying between the

Kickapoo northern boundary line and the Grand Nemahar river, and extending from the Missouri back and westerly with the said Kickapoo line and the Grand Nemahar, making four hundred sections; to be divided between the said Ioways and Missouri band of Sacks and Foxes, the lower half to the Sack and Foxes, and the upper half to the Ioways.

TREATY WITH THE IOWA, May 17, 1854, art. 1, 10 Stat. 1069.

ARTICLE 1. The Ioway tribe of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the country, with the exception hereinafter named, which was assigned to them by the treaty concluded with their tribe and the Missouri bands of Sacs and Foxes, by William Clark, superintendent of Indian affairs, on the seventeenth of September, one thousand eight hundred and thirty-six, being the upper half of the tract described in the second article thereof, as "the small strip of land on the south side of the Missouri River, lying between the Kickapoo northern boundary-line and the Grand Nemahaw River, and extending from the Missouri back and westerly with the said Kickapoo line and the Grand Nemahaw, making four hundred sections; to be divided between the said Ioways and Missouri band of Sac and Foxes; the lower half to the Sacs and Foxes, the upper half to the Ioways," but they except and reserve of said country, so much thereof as is embraced within and designated by the following metes and bounds, viz: Beginning at the mouth of the Great Nemahaw River where it empties into the Missouri; thence down the Missouri River to the mouth of Noland's Creek; thence due south one mile; thence due west to the south fork of the Nemahaw River; thence

down the said fork with its meanders to the Great Nemahaw River, and thence with the meanders of said river to the place of beginning, which country, it is hereby agreed, shall be the future and permanent home of the Ioway Indians.

TREATY WITH THE SACS AND FOXES OF MISSOURI, May 18, 1854, art. 1, 10 Stat. 1074.

ARTICLE 1. The Sacs and Foxes of Missouri hereby cede, relinquish and convey to the United States all their rights, title and interest in and to the country assigned to them by the treaty concluded on the seventeenth day of September, one thousand eight hundred and thirty-six, between William Clark, superintendent of Indian affairs, on the part of the United States, and the Ioways and Missouri Sacs and Foxes, being the lower half of the country described in the second article thereof as "the small strip of land on the south side of the Missouri River, lying between the Kickapoo northern boundary-line and the Grand Nemahaw River, and extending from the Missouri back and westwardly with the said Kickapoo line and the Grand Nemahaw, making four hundred sections; to be divided between the said Ioways and Missouri band of Sacs and Foxes; the lower half of the Sacs and Foxes, the upper half to the Ioways;" saving and reserving fifty sections, of six hundred and forty acres each, which shall be selected in the western part of the cession by the delegates, parties hereto, and the agent for the tribe, after their return home, and which shall be located in one body and set off by metes and bounds: *Provided,* That the delegates and agent can find such an amount of land in one body within said specified section of country suitable to the wants and wishes of the

Indians. *And it is further provided,* That should a suitable location, upon examination, to the full extent of fifty sections not be found within said western part of this cession, then the said delegates and agent shall be permitted to extend the location west or northwest of the country herein ceded and south of the Great Nemahaw River, over so much of the public domain, otherwise unappropriated, as shall make up the deficiency; or to make a selection entirely beyond the limits of the country herein ceded upon any lands of the United States, not otherwise appropriated, lying as aforesaid west or northwest of the ceded country and south of the Great Nemahaw. And in either case they shall describe their selection, which must be made within six months from the date hereof, by metes and bounds, and transmit the description thereof signed by said delegates and agent, to the Commissioner of Indian Affairs; and thereupon the selection so made, shall be taken and deemed as the future permanent home of the Sac and Foxes of Missouri. It is expressly understood that these Indians shall claim under this article, no more than fifty sections of land, and if that quantity or any portion thereof shall be selected outside thereof, shall be and the same is hereby, ceded, relinquished, and conveyed to the United States.

UNPUBLISHED CASES:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PRAIRIE BAND OF POTAWATOMI
INDIANS, et al.,

Plaintiffs,

VS. Civil No. 78-4197-RDR

RAYMOND JACKMAN, et al.,
Defendants.

ORDER NUNC PRO TUNC

Plaintiffs appear through one of their attorneys of record, Lance W. Burr; Defendants appear through their attorney of record, J. Richard Lake. And the Court, after being well and duly advised in the premise, finds:

1. That paragraph 13 of the Court's original findings of fact and conclusions of law reads as follows: "In order to qualify for immunity from personal property taxation, an Indian shall be domiciled within the Reservation boundaries and the personal property shall be principally located within the boundaries of the Reservation. Personal property which is located principally within the boundaries of the Reservation and which is owned by a resident Indian in joint -tenancy with some other person, or as a tenant in common with some other person, shall be immune from ad valorem taxation;".

2. That following the words "Reservation boundaries" in the third line of paragraph 13 the words "or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian tribe" should be inserted; and that following the words "principally located within the boundaries of the Reservation" in line 4 of paragraph 13 the words "or upon any real property not within

Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian tribe." should be inserted; and that the following words should be inserted after "boundaries of the Reservation" found at line 6 of paragraph 13, "or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian tribe."

3. That paragraph 13 is hereby modified by this Order Nunc Pro Tunc to read as follows: "In order to qualify for immunity from personal property taxation, an Indian shall be domiciled within the Reservation boundaries or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or Indian Tribe and the personal property shall be principally located within the boundaries of the Reservation or upon any real property not within Reservation boundaries that is held in trust by the United States belonging to any Indian or any Indian tribe. Personal property which is located principally within the boundaries of the Reservation or upon any real property not within Reservation boundaries that isheldin trust by the United States belonging to any Indian or any Indian tribe and which is owned by a resident Indian in joint tenancy with some other person, or as a tenant in common with someother person, shall be immune from ad valorem taxation;"

IT IS SO ORDERED.

Judge

SUBMITTED AND APPROVED:
U S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE KICKAPOO TRIBE IN KANSAS, et al.,
Plaintiff,

VS. Case No. 99-4059-SAC

LAMAR SHOEMAKER, individually and in
his official capacity as SHERIFF OF
BROWN COUNTY, KANSAS,
Defendants.

DECLATORY JUDGMENT AND PERMANENT INJUNCTION

This matter comes before the Court on this 9th day of February, 2000, on plaintiff's petition for declaratory judgment and permanent injunction. Plaintiff appears by its counsel, Charley Laman. Defendant, Lamar Shoemaker, appears by his counsel, J. Steven Pigg.

The Court has previously, following a hearing on April 26, 1999, entered a Temporary Restraining Order (TRO) enjoining the defendant from serving process on lands federally recognized as the Reservation of the Kickapoo Tribe. That TRO has been continued by agreement of the parties until the present date. The parties have submitted proffers of evidence and have requested the Court to consolidate the preliminary and permanent injunction hearings and to base the Court's decision upon the evidence presented at the hearing on the Temporary Restraining Order and the written proffers of

evidence filed by the parties.

After reviewing the evidence submitted at the TRO hearing and the proffers of evidence and applicable case law, the Court enters the following findings of fact and conclusions of law.

1. The Court has jurisdiction over the parties and the subject matter of this action pursuant to 28 U.S.C. § 1331 and 1362. Venue is proper under 28 U.S.C. § 1391(b).

2. By agreement of the parties, the trial of this action on the merits is advanced and consolidated with the hearing on the application for preliminary injunction.

3. The Tribe is a federally-recognized Indian Tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* The Tribe is governed by a constitution and bylaws approved by the Secretary of the Interior pursuant to 25 U.S.C. 476. The Tribe operates a tribal judicial system and police force.

4. The Kansas Enabling Act for the Admission of Kansas into the United States, 10 Stat. 290, appears to exclude Indian land from the territorial boundaries and civil jurisdiction of the State of Kansas. The State of Kansas has not assumed civil jurisdiction over the Kickapoo's reservation nor has the Tribe consented to such jurisdiction.

5. The Tribe is the beneficial owner of certain trust lands referred to as its Reservation. The Tribe has asserted that the boundaries of the Reservation are established by the

Treaty of October 24, 1932, Art. 1, 7 Stat. 391, as amended by the Treaty of May 18, 1854, Art. 1, 20 Stat. 1078. The Sheriff has not disputed the Reservation boundaries as being established by the Treaty of June 28, 1962, which are referred to as the "federally recognized boundaries."

6. The parties do not seek a determination of the boundaries of the Reservation in this action. The execution by a deputy sheriff of a state court order of repossession of a motor vehicle which precipitated the filing of this action occurred within the "federally recognized boundaries." The parties agree that the determination of the boundaries of the Kickapoo Reservation is not an element of this action and that any disagreement about the jurisdictional boundaries is not settled by the terms of this order. Each party reserves any right it may have to establish or contest the jurisdictional boundaries of the Reservation in subsequent proceedings and *res judicata*, collateral estoppel or any other legal or equitable doctrine shall not affect the rights of the parties with respect to the boundaries of the Kickapoo Reservation. The parties also agree that this action excludes from its determination whether streets, roads and highways within the "federally recognized boundaries" are a part of the Reservation with the parties reserving their rights to resolve any dispute regarding jurisdiction over the streets, roads and highways in subsequent proceedings without the application of *res judicata*, collateral estoppel or any other legal or equitable doctrine affecting that determination.

7. The Sheriff of Brown County, Kansas, does not have jurisdiction to physically serve pre-judgment or post-judgment civil process on the Reservation within its "federally

recognized boundaries" which are outlined in the attached Exhibits A (Map) and B (Boundary Description). *See gen., Joe v. Marcum,* 621 F.2d 358 (10th Cir. 1980).

8. Serving of civil process by mail through the U.S. Postal Service in any manner permitted by the Kansas Rules of Civil Procedure is not a violation of the Kickapoo Tribe's jurisdiction.

9. The Tribe is entitled to a declaratory judgment and permanent injunction precluding the sheriff from physically serving civil process before or after civil judgment within the "federally recognized boundaries" of the Reservation described in Exhibits A and B.

10. Neither the plaintiff nor the defendant seeks recovery of attorney's fees, costs or expenses of this litigation nor does either party make a claim for damages against the other.

11. The parties have submitted this order by agreement and waive all rights of appeal.

IT IS THEREFORE DECLARED BY THE COURT that the Sheriff of Brown County does not have jurisdiction to physically serve pre-judgment or post-judgment civil process within "federally recognized boundaries" of the Reservation as described in Exhibits A and B.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, the Sheriff of Brown County, Kansas, is permanently enjoined from physically serving civil

process within the described boundaries of the Reservation as described Exhibits A and B.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction entered herein does not prohibit any person or entity from filing lawful actions in the Kickapoo District Court or requesting the Tribal Court or Tribal Police to serve process and issue post-judgment remedies or conduct other proceedings pursuant to the Tribal Code or serving process by mail through the United States Postal Service.

This declaratory Judgment and Permanent Injunction was issued on this 9th day of February, 2000, supercedes the temporary restraining order, and is in full force and effect immediately.

IT IS SO ORDERED.

SAM A CROW
UNITED STATES DISTRICT
COURT SENIOR JUDGE

APPROVED BY:

CHARLEY LAMAN
ATTORNEY AT LAW
Kickapoo Legal Services
P.O. Box 109
Horton, KS 66439 (785) 486-2131
U.S.A./Indian Country

By: Charley Laman #10130
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By: J. Steven Pigg #09213
Attorney for Defendant
Lamar Shoemaker

EXHIBIT A

BEST AVAILABLE COPY

KICKAPOO TRIBE IN KANSAS

LEGAL DESCRIPTION FOR FEDERALLY RECOGNIZED KICKAPOO RESERVATION

The following is the legal description for the federally recognized boundaries of the Kickapoo Reservation in Kansas, to wit:

Commencing at the Northwest Corner of Section 2, Township 4 South, Range 15 East; thence South for a distance of six (6) miles along the Western Boundary of Sections 2, 11, 14, 23, 26, & 35, of Township 4 South, Range 15 East, to the Southwest Corner of Section 35, of Township 4 South, Range 15 East; thence East for a distance of five (5) miles along the Southern Boundary lines of Sections 35 & 36 of Township 4 South, Range 15 East, and Sections 31, 32, & 33 of Township 4 South, of Range 16 East, (*This five (5) miles East is the Southern Boundary Line of Brown County, Kansas and the Northern Boundary Line of Jackson County, Kansas.*) To the Southeast Corner of Section 33, Township 4 South, of Range 16 East; thence North for a distance of six (6) miles on the Eastern Section boundary lines of Sections 33, 28, 21, 16, 9, & 4 of Township 4 South, Range 16 East, to the Northeast Corner of Section 4, of Township 4 South of Range 16 East; thence West five (5) miles along the Northern Section Boundary lines of Sections 4, 5, & 6, of Township 4 South, Range 16 East, and Sections 1 & 2, of Township 4 south, Range 15 East to the point of beginning; ALL BEING PLATTED IN BROWN COUNTY, KANSAS.

EXHIBIT B